THE

NORTHERN IRELAND LAW REPORTS

CONTAINING

REPORTS OF CASES ARGUED AND DETERMINED

IN

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

EDITED BY

FRANCIS NEWARK,

BARRISTER-AT-LAW.

1950

BELFAST:

PUBLISHED BY THE INCORPORATED COUNCIL OF LAW REPORTING

FOR NORTHERN IRELAND.

1950.

Lord Chief Justice:

THE RIGHT HON. SIR JAMES ANDREWS, BART.

Lords Justices of Appeal:

THE RIGHT HON. SAMUEL CLARKE PORTER.
THE RIGHT HON. ARTHUR BLACK.

Chancery Division:

THE HON. LANCELOT ERNEST CURRAN.

King's Bench Division:

THE HON. CHARLES LEO SHEIL.

Attorney-General:

THE RIGHT HON. JOHN EDMOND WARNOCK, K.C., M.P.

Incorporated Council of Law Reporting for Northern Ireland.

Chairman :
W. F. PATTON, Esq., K.C

Ex-Officio Member :
The Rt. Hon. J. EDMOND WARNOCK, K.C., M.P., Attorney-General.

Appointed Members :

JAMES McSPARRAN, Esq., K.C.
W. F. McCOY, Esq., K.C.
G. B. HANNA, Esq., K.C.
— *By the Inn of Court of Northern Ireland.*

W. F. PATTON, Esq., K.C.
H. A. McVEIGH, Esq., K.C.
L. G. MOODY, Esq., Barrister-at-Law.
— *By the General Council of the Bar.*

J. F. CALDWELL, Esq., K.C., *By the Ministry of Finance.*
H. J. CATCHPOLE, Esq., *By the Incorporated Law Society.*

Secretary and Treasurer :
JAMES McCONNELL, Esq., Barrister-at-Law.

Editor :
FRANCIS NEWARK, Esq., Barrister-at-Law.

REPORTERS:

JAMES MCCONNELL, ESQ., Barrister-at-Law.

J. PETRIE, ESQ., Barrister-at-Law.

MISS S. M. MURNAGHAN, Barrister-at-Law.

Digitized by the Internet Archive
in 2026

https://archive.org/details/northern-ireland-law-reports_1950

TABLE OF CASES REPORTED

IN THIS VOLUME

A.

Antrim County Council, Getty *v.* 114

B.

Bangor Borough Council *v.* Lennon 172

Belfast Corporation *v.* McCormick 1

Brown, Provincial Building Society *v.* 163

Browne, Henry, Rex *v.* .. 20

C.

Carlisle decd., *In re*, Belfast Bank Executor and Trustee Co. *v.* Patterson and others 105

Clark *v.* Ulster Bank, Ltd. .. 132

Corry's Will Trusts, *In re*, Corry *v.* Corry 159

Creery *v.* Judge 13

D.

Dobler *v.* Walsh 150

Doherty, *In re*, Quinn *v.* Clarke and another 83

G.

Galloway *v.* Irish Sailors and Soldiers Land Trust .. 32

Getty *v.* Antrim County Council 114

H

Hunter, *In re* 187

I.

Irish Sailors and Soldiers Land Trust, Galloway *v.* 32

J.

Judge, Creery *v.* 13

L.

Lennon, Bangor Borough Council *v.* 172

Lyons *v.* Lyons 181

M.

McBlain, H. W. West, Ltd. *v.* 144

McCormick, Belfast Corporation *v.* 1

P.

Provincial Building Society *v.* Brown 163

Q.

Quinn, Tease *v.* 98

R.

Rex *v.* Henry Browne .. 20

Rex *v.* Robert Taylor .. 57

Rex *v.* Edward Wightman 124

T.

Taylor, Robert Rex *v.* .. 57

Tease *v.* Quinn 98

U.

Ulster Bank Ltd., Clarke *v.* 132

W.

Walsh, Dobler *v.* 150

West, H. W., Ltd , *v.* McBlain 144

Wightman, Edward, Rex *v.* 124

TABLE OF CASES CITED.

PAGE

A.

Abbott *v.* Minister for Lands 52
Acherley *v.* Vernon 87, 90
Agar *v.* George 160
Antrim, etc. Investment Co. *v.* Stewart 168
Arbib and Class's contract, *In re* 92
Athlumney, *In re* 40
Att.-Gen. *v.* Horner 174
Att.-Gen. *v.* Wilcox 179

B.

Bailey *v.* Finch 142
Bater *v.* Bater 185
Belsize Motor Supply Co. *v.* Cox 148
Bland's Settlement, *In re* .. 160
Bogle *v.* Sherborne Local Board 3
Bowling *v.* Camp 35
Brackley Co-op. Society *v.* Tyrone C.C. 116
Bywater, *Re* 113

C.

Castro *v.* The Queen 130
Cavendish *v.* Cavendish .. 164
Cazenove, *In re* 160
Central Control Board *v.* Cannon Brewery, Ltd. .. 174, 177
Charter *v.* Charter 110
Churchman *v.* Churchman 181, 182
Clarke-Jervoise *v.* Scutt .. 178
Clavering *v.* Ellison 91
Commissioners of Income Tax *v.* Pemsel 42
Congested Districts Board *v.* Mayo C.C. 120, 121, 122
Cooksey *v.* Haines 81
Croydon Corporation *v.* Thomas 3, 7, 9

D.

Damery's case 68
Davies *v.* Warwick 35, 41
Davis *v.* Davis 183
Delamere's case (Lord) .. 58, 60
Del Mare *v.* Rebello 108
Dilworth *v.* Commissioner of Stamps 178
D.P.P. *v.* Beard 21, 24, 25, 29, 30
D.P.P. *v.* Lamb 48
Doe d. Gwillim *v.* Gwillim .. 107
Doe d. Oxenden *v.* Chichester 108
Dolan *v.* Murphy 165
Dowie's Will Trusts, *In re* .. 160
Du Cros *v.* Lambourne .. 102
Dyke *v.* Elliott 180

PAGE

E.

Emery, *In re* 151, 155, 156
European Bank, *In re* .. 142
Exmouth, *In re* Viscount .. 91

F.

Fairburn *v.* Evans 101
Fanshaw *v.* Knowles 60
Fielding *v.* Morley Corp. .. 45
Fillingham *v.* Bromley 91
Fish, *In re* 111
Fitzgerald *v.* Ryan 87
Flanagan, In the goods of 150, 154

G.

Gardner *v.* Lucas 34, 51
Gardner & Co. *v.* Cone 35
Ginesi *v.* Ginesi .. 181, 182
Goby *v.* Wetherill 70
Gould & Co. *v.* Houghton .. 103
Gower *v.* Gower 183
Greenwood, *In re* 87
Greenwood Teale *v.* Williams, Brown & Co. 135
Grey *v.* Pearson 85
Gulliver d. Corrie *v.* Ashby .. 87

H.

Hamilton Gell *v.* White .. 53
Helby *v.* Matthews 148
Henderson *v.* Henderson .. 108
Homolka *v.* Osmond 104

I.

Inland Revenue Comms. *v.* Cookman 169

J.

Jackson's Will, *In re* 160

K.

Keeves *v.* Dean 36
Kellner's Will Trusts, *In re* .. 189
Khoo Hooi Leong *v.* Khoo Hean Kwee 111
King (Small) *v.* Black 173
Kingston, *Ex parte* 135, 136, 137, 141
Kirby *v.* Kerry C.C. .. 120, 121
Kruse *v.* Johnson 3, 5

L.

Lambert *v.* Bassett .. 150, 155
Lauri *v.* Renad 40
Leyburn *v.* Armagh, C.C. 121, 121, 122
Lloyd *v.* Pritchard 160
Lord Advocate *v.* Campbell .. 29
Loveden *v.* Loveden .. 185

TABLE OF CASES CITED

PAGE

M.

Mackalley's case 103
Mackenzie's Settlement, *In re* 160
Magee *v.* Mark 184
Marten *v.* Rocke, Eyton & Co. 135
McCleary, *In re* John 91,97
McEntire *v.* Crossley Bros. .. 148
McNeany *v.* Maguire 151
Midland Ry. *v.* Watton .. 173
Miller *v.* Minister of Pensions 183
Moon, *v.* Durden 34
Moran *v.* Place 151, 155, 156
Mordaunt *v.* Moncrieffe .. 183
Morier, *Ex parte* 142
Morris, *In re* 142

N.

Nat. Soc. Prevention of Cruelty to Children *v.* Scottish Nat. Soc., etc. 108, 109
Noblett *v.* Leitrim C.C. .. 116
Norton, *Re* 107

O.

Ofner, *In re* 110

P.

Pardo *v.* Bingham 35, 42
Parkinson, *In re* 169
Parkinson *v.* Dashwood .. 160
Parsons, *In re* 160
Pearce, *In re* 111
Popham v. Bampfield 87
Portsea Island Building Soc. *v.* Barclay 170
Powell *v.* Kempton Park Racecourse 45

R.

R. *v.* Baines 27
R. *v.* Bertrand 60,80
R. *v.* Caspar 68
R. *v.* Crippen .. 59, 61, 71, 75
R. *v.* David 129
R. *v.* Doherty 29
R. *v.* Fisher 117
R. *v.* Fowler & Sexton 59
R. *v.* Hardy 71
R. *v.* Harrison 23
R. *v.* Horne Tooke .. 58, 68, 71
R. *v.* Ketteridge 59, 61, 62, 70 73, 76, 79
R. *v.* Kinnear 61,67
R. *v.* McKee 22
R. *v.* Meade 21, 24, 25
R. *v.* Murphy 73, 81
R. *v.* Nat. Arbitration Tribunal 45
R. *v.* Neal .. 59, 61, 70, 79, 81
R. *v.* O'Neill & Henderson .. 59,73
R. *v.* Raper 22, 25
R. *v.* Spratling 129
R. *v.* Stone 72
R. *v.* Tacey 117
R. *v.* Wilkes 130
R. *v.* Willmont 70
R. (Small) *v.* Black 173
Rankin & Shiliday, *In re* .. 148
Reid *v.* Reid 34
Republic of Costa Rica *v.* Erlanger 41
Robinson *v.* Barton-Eccles Local Board 173, 177
Robson *v.* Robson 153
Roxburghe *v.* Cox 143
Rudler *v.* Franks 36
Ryan *v.* Tipperary C.C. .. 119

S.

St. James, etc., Clerkenwell *v.* Feary 3, 4
St. John's Hackney *v.* Hutton 3, 4
St. John, Hampstead, Vestry of *v.* Cotton 173, 177
St. Mary, Islington, Vestry of *v.* Barrett 173
St. Mary, Newington, Vestry of *v.* Jacobs 173
Sherratt *v.* Mountford .. 108
Sifton *v.* Sifton 91
Simpson, *In re* 160
Stead *v.* Carey 41
Sussex Peerage case 42
Sutton *v.* Sutton 45

T.

Thomson *v.* Clydesdale Bank 135, 137
Twomey, In the Goods of 150, 153
Tyler & Sons *v.* Cork C.C. 119, 120, 121

U.

Union Bank of Australia *v.* Murray-Aynsley .. 135, 143

V.

Vacher *v.* London Soc. of Compositors 35, 45
Vansittart *v.* Taylor 34

W.

Ward *v.* British Oak Insurance 34
Ward *v.* Skeehan .. 150, 154
Ware, *In re* 160
Welby *v.* Parker 36
Wessel *v.* Carter Paterson .. 104
White *v.* Cubitt 173
Whitehorn *v.* Davison .. 147
Whiteley, Ltd. *v.* Hilt 148
Williams & Stepney, *In re* .. 41
Winsor *v.* Reg. 61
Wirral Estates *v.* Shaw .. 36

CASES

DETERMINED BY

THE HIGH COURT OF JUSTICE

AND ON APPEAL THEREFROM IN

THE COURT OF APPEAL

IN

NORTHERN IRELAND

BELFAST CORPORATION v. McCORMICK (1).

Local Government—Power of local authority to require owner or occupier to supply dustbin—Notice to owner—Complaint at petty sessions—Jurisdiction of petty sessions to consider equities as between owner and occupier—Belfast Corporation Act (Northern Ireland), 1930 (20 & 21 Geo. 5, c. ii), s. 44.

On the hearing at petty sessions of a complaint by the Corporation that the defendant as owner of a dwellinghouse failed to comply with a notice under s. 44 of the Belfast Corporation Act (Northern Ireland), 1930, requiring him to provide and maintain a dustbin for the dwellinghouse, the resident magistrate has no jurisdiction to consider whether it would have been more equitable for the Corporation to have imposed the obligation on the occupier instead of on the owner, but must impose a penalty on proof that the requirements of the notice have not been complied with.

CASE STATED by the resident magistrate sitting at Belfast Petty Sessions.

In pursuance of the provisions of section 44 of the Belfast Corporation Act (Northern Ireland), 1930, the Belfast Corporation, the appellants, served a notice on the respondent, as the owner of a dwellinghouse from which the appellants were required to remove house refuse, requiring him to provide and maintain

(1) In the King's Bench Division before Porter L.J. and Sheil J., June 30; July 4, 5, 1949.

in good order and condition at the said dwellinghouse a dustbin of such size and construction as was specified in the notice. The respondent failed to comply with the requirements of the notice within fourteen days of the service thereof. At the hearing of a complaint by the appellants at petty sessions, as provided for in the section, the resident magistrate found that the premises, which were rent-controlled under the Rent Acts, were let by the respondent to a tenant from week to week at a weekly rent of £1, and that as between the respondent and the tenant there was no contractual obligation on the respondent to supply a dustbin. He further found that the cost of repairs which was borne by the respondent had increased and was six times the cost of repairs in 1939, and that the cost of dustbins had risen from 4*s*. 6*d*. each in 1939 to 25*s*. 6*d*. at the present time. On these facts the resident magistrate considered, *inter alia*, whether it was equitable that the owner and not the occupier should have been required to provide and maintain the dustbin, and having come to the conclusion that it was not he dismissed the complaint. On the application of the appellants he stated this case for the opinion of the High Court.

Section 44 of the Belfast Corporation Act (Northern Ireland), 1930, provides :—

> " (1) The Corporation may by notice in writing " require the owner or occupier of any dwelling-house, " warehouse or shop from which the Corporation " undertake or may be required to remove any house " or trade refuse to provide and maintain in good " order and condition dustbins for the convenient " removal of such refuse and such dustbins shall be " of such size and construction as as [*sic* (1)] may be " approved by the Corporation and any owner or " occupier who fails within fourteen days after " service of such notice upon him to comply with the " requirements of the Corporation or who fails to " use a dustbin provided in accordance with such

(1) [So printed on the vellum copy deposited with the Clerk of Parliaments.—EDITOR.]

" notice for the removal of such refuse shall be " liable to a penalty not exceeding twenty shillings " and to a daily penalty not exceeding five shillings : " Provided that this section shall not authorise the " Corporation to require the provision of a dustbin " in any case in which a dustbin in use at the passing " of this Act is of suitable size and in good order " and condition."

" (2) Sub-section (2) of section 26 of the Public " Health Acts Amendment Act, 1890, in its applica- " tion to the City and the Corporation shall have " effect as if the words ' or trade ' had been inserted " therein after the word ' house '."

" (3) The Corporation may sell supply and let for " hire to the owners or occupiers of premises in the " City, but shall not manufacture, dustbins for " refuse and may make such charges therefor as " they may think reasonable."

" (4) In this section the word ' dustbin ' means a " portable receptacle."

Curran A.-G. and *Gibson* for the appellants.
Harrison K.C. and *Lowry* for the respondent.

[The following cases were cited in argument :—*Bogle v. Sherborne Local Board* (1), *Vestry of St. James and St. John, Clerkenwell v. Feary* (2), *Vestry of St. John's, Hackney v. Hutton* (3), *Kruse v. Johnson* (4), *Croydon Corporation v. Thomas* (5).]

Cur. adv. vult.

PORTER L.J. [after stating the facts and referring to s. 44 continued] :—

In the first case referred to, *Bogle v. Sherborne Local Board* (1), Bogle was the owner of thirty houses, each of which had a water-closet, but there was no proper flushing apparatus, and the Local Board, acting on the report of their surveyor, served a notice upon him under section 36 of the English Public Health Act,

(1) (1882) 46 J.P. 675.
(2) (1890) 24 Q.B.D. 703.
(3) [1897] 1 Q.B. 210.
(4) [1898] 2 Q.B. 91.
(5) [1947] K.B. 386.

1875, compelling him to provide proper and sufficient water-closet accommodation. He failed to do so, and the Board then executed the necessary works and took out a summons against him to recover the expenses incurred. The magistrates made an order for payment, holding that their duty was ministerial only and that they could not entertain the question whether the works were necessary or not, but that this was a matter for the Board to determine on the advice of their surveyor. The Queen's Bench Division, on an application for a certiorari, held that the magistrates were right, and that the only appeal on the facts lay to the Local Government Board under section 268 of the Act. In that case Bogle had attempted to adduce evidence that the works were unnecessary, but it was not argued that he was not the proper person to execute the works if they were necessary.

In *Vestry of St. James and St. John, Clerkenwell v. Feary* (1), an order had been made on the owner of a house to provide a proper door and proper coverings for a water-closet in the house. The inspector of the parish had made a report on the condition of the water-closet and the order of the Vestry was based on this report. The defendant contended before the magistrates that the door of the room constituted the door of the water-closet, and that the magistrate was not bound by the decision of the Vestry. The magistrate decided that the water-closet had a proper door and covering, and a case was stated for the High Court. Lord Coleridge C.J. and Lord Esher M.R. held that Feary ought to have appealed to the County Council, as provided by the Metropolis Local Management Act, 1855, section 211. In this case also, the question was, whether the works were necessary, and there was no contention that the defendant was not the proper person to execute the works if they were necessary.

Vestry of St. John's, Hackney v. Hutton (2) was a case under the Public Health (London) Act, 1891, which also gives a right of appeal by an aggrieved person to the County Council. The magistrate had

(1) (1890) 24 Q.B.D. 703. (2) [1897] 1 Q.B. 210.

dismissed the summons, and the question was whether he was bound by the decision of the sanitary authority that the house was not furnished with the proper and sufficient water-closet accommodation. The Court (Grantham and Wright JJ.) held that the magistrate had no right to reverse the decision of the sanitary authority, which in default of an appeal to the County Council was the sole determining authority under the Act.

I think, therefore, that these three cases, on which Mr. Gibson laid such stress, are not of much assistance. Firstly, because in each case the question was whether the works ordered were or were not necessary, and secondly, because the right of the sanitary authority to serve a notice upon either the owner or the occupier was never questioned, and thirdly, the persons served with the notices had a right of appeal to the Local Government Board or the County Council.

Mr. Harrison, for the defendant, sought to draw an analogy between the effect of a bye-law in creating a liability and the effect of a sanitary notice served upon an owner or occupier which might lead to the imposition of a penalty, and to possible imprisonment if it were not complied with by the person on whom it was served.

He referred us to the well-known case of *Kruse v. Johnson* (1). That case, which was heard before Lord Russell of Killowen C.J. and six other judges, decided, not that the bye-law impugned was unreasonable but that when a bye-law is made by a representative body entrusted with the making of bye-laws the court ought to be slow to hold it void for unreasonableness, unless it is manifestly partial and unequal in its operation between different classes, or unjust, or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it. If there is any analogy, I think it is rather against Mr. Harrison's contention, because we must assume, in the absence of any evidence, that the Corporation, which is entrusted with the duty of safeguarding the

(1) [1898] 2 Q.B. 91.

health of this great city, was not actuated by any bias or unfair motive against the owner in this case.

He further pointed out that section 72 of the 1930 Act incorporates section 69 of the 1923 Act relating to the recovery of penalties, and argued that proceedings under section 69 were criminal proceedings, that the sanction was imprisonment, and that it would be a most extraordinary thing that the Court of Petty Sessions, when adjudicating upon a criminal matter, should have its jurisdiction to inquire into the merits of the case abrogated, or even curtailed, especially when there was no other authority to which an aggrieved owner or occupier could appeal.

Under the 1930 Act there is no appeal to the Ministry of Home Affairs, and, therefore, he argued, it is all the more necessary that the Court of Petty Sessions, which is the only authority to which the owner can look for a remedy, and which should have at least all the powers of the body for which it appears to be substituted, should have jurisdiction to investigate all the facts as to liability, and decide the case on the merits.

The learned Attorney-General replied that the Legislature gave the Corporation the discretion to serve the notice upon the owner or occupier, and that the object of the contention of the respondent was to annul the discretion and give it to the Petty Sessions Court, that section 44 creates a liability, which arises upon the service of the notice, and if the magistrate finds that the notice has been duly served upon an owner, and that he has not complied with the requirements of the notice, he must impose the penalty, but he has jurisdiction to decide on the amount of the penalty, whether it should be nominal or anything less than that prescribed by the Act.

I would put it in this way. The section creates the liability and imposes the sanction of the penalty without discriminating between the two parties, the owner and the occupier. The duty of discrimination is cast upon the Corporation, who cause the liability to fall upon one of the parties by serving him with the

notice. Upon failure to comply with the notice, the magistrate can impose the maximum penalty, but he is not bound to do so if the circumstances of the case show that a less or a nominal penalty would be just and proper.

I think there is a real difficulty in asking the Petty Sessions Court to decide the question of liability as between the owner and the occupier, firstly, because only one party, the owner, has been served with the notice, secondly, because the occupier is not a party to the proceedings, and there is no procedure that I know of by which the occupier could be made a party to the proceedings, as there is in the English Public Health Act of 1936, section 290, which provides that in a number of specified cases a copy of the notice of appeal shall be served upon the occupier, and gives the court jurisdiction to make an order against either the owner or the occupier.

The case of *Croydon Corporation v. Thomas* (1) was relied on by both parties. The English Public Health Act of 1936, section 75 (1), gives power to the local authority, who have undertaken the removal of household rubbish within their district, to require the owner or occupier of any building within their district to provide suitable covered dustbins, but, unlike the Belfast Corporation Act of 1930 this is followed by a special provision that any person aggrieved by a requirement of the local authority under this sub-section may appeal to a Court of Summary Jurisdiction.

The Court, consisting of Lord Goddard C.J., Humphreys and Lewis JJ., decided that on such an appeal the justices were at liberty to consider the equities as between the owner and the occupier.

There we have a special provision for an appeal to a Court of Summary Jurisdiction, and this, I think, is the vital difference between that case and the present one. At any rate Lord Goddard was of opinion that but for this special provision the owner would have failed. At page 388, he says :

(1) [1947] K.B. 386.

"If you take the first part of sub-section (1) "alone, it appears to put the widest possible "discretion, into the hands of the local authority. "It appears to enable them, by administrative "action, to require either the owner or the occupier "to provide this dustbin. Accordingly, if the "section remained without the addition of the "words I have just read, it would seem reasonably "clear that that was an administrative discretion "given to an elected body, such as the corporation, "with which no one could interfere. It is not a "discretion, on the face of it, which requires to be "exercised judicially; it is an administrative dis-"cretion." Humphreys and Lewis JJ. agreed.

The words of Lord Goddard seem to me to apply exactly to the present case. I agree that the discretion given to the Corporation by the Legislature is an administrative discretion, and that the Court of Petty Sessions has no jurisdiction to interfere with the exercise of that discretion.

The question will be answered in the negative, and the case remitted to the Petty Sessions Court to be dealt with according to law.

SHEIL J.: This is a case stated by a resident magistrate sitting at Belfast, for determination by this court as to whether he was correct in law in dismissing at Belfast Petty Sessions a complaint by the Lord Mayor Aldermen and Citizens of the City of Belfast against Mr. William McCormick, for that he, being the owner of a dwelling house situate at 10 Manor Street in the City of Belfast, had failed within fourteen days after the service of a notice upon him, requiring him to provide and to maintain in good order and condition at the said dwelling house a dustbin of the size and construction required by the said notice, to comply with the requirements of the said notice.

Put shortly the issue is this—whether at the hearing of the said complaint, the service of the notice on the defendant and as owner and his failure to comply with the requirements thereof having been proved, the

resident magistrate was entitled to consider whether the owner should be liable to provide a dustbin, and decide accordingly, or whether, the above matters having been proved, the resident magistrate was entitled only to consider the question of penalty.

[The learned judge then read s. 44 of the Belfast Corporation Act (Northern Ireland), 1930, and continued]: This is a section concerned with the public health of the city. Sub-section (1) is of itself, by its terms, sufficient to demonstrate that, and sub-section (2) by its reference to the Public Health Acts Amendment Act, 1890, puts the matter beyond doubt. Public health, therefore, must be the overriding consideration in construing the Act of 1930. The Corporation are required to remove house refuse from 10 Manor Street in accordance with the provisions of the Public Health (Ireland) Act, 1878, and they are, therefore, entitled to require the owner or occupier of that house to provide a dustbin under section 44. They required the owner to do so. Can that decision—requiring the owner rather than the occupier to provide the dustbin—be reviewed and reversed by the Court of Petty Sessions?

It was argued for the Corporation that on the facts found in the case stated, the sole function of the resident magistrate was to determine the amount of the penalty, and in support of that argument we were referred to four cases. Of those cases it seems to me that the strongest in favour of the Corporation is the *Croydon Corporation v. Thomas* (1) by reason of certain dicta of Lord Goddard C.J. where, in dealing with a somewhat similar section—section 75 of the Public Health Act, 1936, in England—he says that: "If you "take the first part of sub-s. 1 alone, it appears to put "the widest possible discretion, into the hands of the "local authority. It appears to enable them, by "administrative action, to require either the owner "or the occupier to provide this dustbin. Accordingly, "if the section remained without the addition of the "words I have just read" (which conferred a right of

(1) [1947] K.B. 386, 388.

appeal by a person aggrieved by the requirement to provide dustbins) "it would seem reasonably clear "that that was an administrative discretion given to "an elected body, such as the corporation, with which "no one could interfere. It is not a discretion on the "face of it, which requires to be exercised judicially; "it is an administrative discretion."

The Lord Chief Justice goes on to say: "But when "you find that any person aggrieved by a requirement "of the local authority may appeal to a court of "summary jurisdiction, it is obvious that Parliament "intends the discretion which has been exercised by "the local authority to be subject to an appeal, and "the final determination, in the event of an appeal, is "left to the justices and not to the local authority."

To my mind those dicta cover this case. There is not in section 44 of the Belfast Act of 1930 any such appeal provision as is contained in the English Act of 1936, and unless somewhere there can be found an implied right of appeal, including a complete right of review, the decision of the Corporation is final and binding.

Counsel for the owner sought to distinguish all those cases. The first three can, perhaps, be distinguished on the ground that in those cases a right of appeal was given to the Local Government Board in the first case, and to the County Council in the other two, but I do not decide that they are, for that reason, to be distinguished. It was not possible, however, for counsel satisfactorily to distinguish the *Croydon case*, and their real argument was based on the jurisdiction of Petty Sessions as set out in section 21 of the Petty Sessions (Ireland) Act, 1851. Briefly that section provided that in all cases of summary jurisdiction, having heard what each party shall have had to say, and the evidence adduced by both, the justices shall make such order, as shall be authorised by the Act under which the complaint shall be made, or shall dismiss the complaint either upon the merits or without prejudice to its being again made, and it is said that since section 72 of the 1930 Act applied the provisions

of section 69 of the Belfast Corporation (Northern Ireland) Act, 1923, which had provided that "penalties" under that Act were to be recovered in a summary manner, the jurisdiction under section 21 of the Petty Sessions Act was invoked and the whole matter was at large. But as we have seen section 21 only enables the justices to make such order as is authorized by the Act under which the complaint has been made, and we must therefore return to section 44 of the Act of 1930. It enables the justices (now the resident magistrate) to make an order, where a person, be he owner or occupier, fails within fourteen days after service of the notice upon him to comply with the requirements of the notice, that that person shall pay a penalty not exceeding twenty shillings, and a daily penalty not exceeding five shillings. That is the only thing the justices can do here—determine the amount of the penalty.

Cases of hardship (this case may itself be one, though the indorsement on the notice states that dustbins can be hired for a few shillings per annum) have been visualised by Mr. Harrison. Let me instance a further case. Take a street of forty houses, thirty-nine of which are occupied by good tenants and one (in the centre of the block) by a tenant who is in every respect a bad tenant, with his rent in arrear and his house and yard in bad condition. As to the thirty-nine, the owner is willing to supply dustbins, but by reason of the remaining tenant's bad conduct, including abuse or larceny of the dustbins already supplied to his house, the owner says to the Petty Sessions Court: "It is inequitable to ask me to supply "this man with further dustbins." The court might well agree with him, but the whole object of the section—the preservation of the public health—might be defeated, unless the Corporation started all over again and served a notice on the occupier who, in the meantime, might have vacated the house.

Section 44 is a Public Health section. The Corporation is the Public Health authority. Unless an appeal be given from its decision in Public Health matters

that decision is, as Lord Goddard has said, final and binding.

Appeal allowed.

Solicitor for the appellant Corporation : *Samuel Love.*
Solicitors for the respondent : *N. & F. Tughan & Walmsley.*

J. P.

CREERY v. JUDGE (1).

Motor car—Licensing—Lorry operated under General Trade Licence—Whether Goods Vehicle Licence required for carrying goods on highway—Roads Vehicle (Registration and Licensing) (Northern Ireland) Regulations, 1947 (*S.R. & O.*, 1947, *No.* 167), *reg.* 29, *art E.—Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1934 (24 *&* 25 *Geo.* 5, *c.* 15), *s.* 24.

Article E of regulation 29 of the Roads Vehicle (Registration and Licensing) (Northern Ireland) Regulations, 1947, which provides that it shall not be necessary for a vehicle properly carrying, using and displaying General Trade Licence plates " to carry any other " identification mark or licence in respect of the vehicle " does not dispense with the requirements of s. 24 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, by which no person may use a goods vehicle on the public highway for the carriage of goods unless there be in force with respect to such vehicle a Goods Vehicle Licence granted under s. 25 of that Act.

Accordingly when a garage proprietor used his motor lorry which carried General Trade Licence plates for carrying a broken-down car and towing a truck it was *held* that such use of the lorry required a Goods Vehicle Licence.

CASE STATED by the resident magistrate sitting at Lisburn Petty Sessions.

The respondent was charged at Lisburn Petty Sessions on the 5th August, 1948, with using a goods vehicle on the public highway for the carriage of goods without having in force with respect to such vehicle a Goods Vehicle Licence as required by section 24 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934. The facts proved or admitted at the hearing were that on the 11th June, 1948, the respondent drove a motor lorry on the public highway ; that the lorry was carrying General Trade Licence plates, and at the time it was stopped it was carrying a broken-down Austin car and towing an army truck ; that on being asked for his Goods Vehicle Licence the respondent said that he had no such licence and did not require one as he had General Trade Licence plates.

At the hearing it was admitted on behalf of the

(1) In the King's Bench Division before Porter L.J. and Sheil J., June 30 ; July 5, 1949.

respondent that the lorry was not licensed as a Goods Vehicle, but it was submitted that article E of regulation 29 of the Roads Vehicle (Registration and Licensing) (Northern Ireland) Regulations, 1947, exempted the respondent from requiring to have a Goods Vehicle Licence. Article E. provides :—

"It shall not be necessary for a vehicle upon "which the plates issued under these Regulations "and a General Trade Licence are being properly "carried used and displayed to carry any other "identification mark or licence in respect of the "vehicle."

The resident magistrate accepted the submission on behalf of the respondent and dismissed the summons, but stated this case for the opinion of the High Court.

Nicholson K.C. and *Lowry* for the appellant.

Brown for the respondent.

Cur. adv. vult.

PORTER L.J. : At Lisburn Petty Sessions, on the 5th August, 1948, the respondent, who is a garage proprietor and motor dealer, was charged with using a goods vehicle on the public highway for the carriage of goods without having in force in respect of such vehicle a Goods Vehicle Licence, as required by section 24 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934. The case stated sets out the following facts :—

At about 6 p.m. on the 11th June, 1948, the defendant was driving a motor lorry owned by him, on the public road near Lisburn. The lorry was carrying general trade plates, namely 121.XI. It was a commercial vehicle and was carrying at the time it was stopped a broken down Austin car and was towing an army truck. On being asked for his Goods Vehicle Licence the defendant said he had no such licence, and that he did not require one as he had General Trade plates.

The only defence raised was that the respondent

was exempted from the requirement of having a Goods Vehicle Licence by virtue of article E. of regulation 29 of the Roads Vehicle (Registration and Licensing) (Northern Ireland) Regulations, 1947, which is as follows :—" It shall not be necessary for a vehicle " upon which the plates issued under these Regulations " and a General Trade Licence are being properly " carried used and displayed to carry any other " identification mark or licence in respect of the " vehicle."

The resident magistrate agreed with this contention and the question is whether he was right in law in dismissing the complaint.

The Regulations referred to were made by the Ministry of Commerce (Northern Ireland) in exercise of the powers conferred upon it by virtue of (*inter alia*) the Roads Act, 1920 ; and Part II of the Regulations contains the Articles relating to General Trade Licences. The authority which grants such a licence is the County Council in whose area the business premises of the manufacturer or repairer of, or the dealer in the mechanically-propelled vehicle are situate. With the licence there is supplied, free of charge, a plate (with a holder for the licence) to be fixed in front, and another plate to be fixed at the back of the vehicle. The plates and the licence holder must be carried at all times when the vehicle is in use on a public road under a General Trade Licence.

Article D. provides that this licence shall not be used upon any vehicle other than a vehicle which is in possession of the holder of the licence in the course of his business, and that the licence shall not be used at any time upon a vehicle which is being used for the conveyance of passengers for profit or reward, and also that no vehicle shall be used upon a public road under a General Trade Licence for any purpose other than a purpose for which the vehicle is authorized by this article under such licence.

Subject to paragraphs (1) and (2) of this article it is further provided that a vehicle may be used upon a public road under a General Trade Licence for any

purpose connected with the business as a manufacturer or repairer of, or a dealer in, mechanically-propelled vehicles of the holder of the licence, and so long as such vehicle is, *bona fide*, being used for such purpose, the holder of the licence shall not by reason only that some other or further use is being made of the vehicle, be deemed to commit a breach of these regulations.

Then follows article E. which I have set out, and it is upon the exemption or dispensation therein contained that the defendant relies for his answer to the complaint.

In determining what effect, if any, this article has upon the provisions of section 24, I do not think we derive any assistance from a consideration of the difference in objects and scope of the Act of 1934 and that of 1920. Counsel for the appellant argued that the 1920 Act dealt with the collection and application of excise duties on mechanically-propelled vehicles, whereas the main object of the 1934 Act was to regulate road traffic and the carriage of goods by motor vehicles, and that it was, therefore, highly improbable that the other licence which article E. rendered it unnecessary to carry could refer to the Goods Vehicle Licence which was required by section 24 of the 1934 Act. That there is no weight in this argument is apparent when one considers that the Regulations, of which article E. forms a part, were made by the same authority as grants the Goods Vehicles Licences—that is to say, the Ministry of Commerce—which I think must be presumed to have known what the use of such a general word as licence would imply. Mr. Lowry was, however, clearly right in saying that the word "carry" in the phrase "to *carry* no other "identification mark or licence" is used in a physical sense, and that it cannot mean or imply the taking out or holding of no other licence. Of this there can be no doubt, when one considers that the preceding words refer to the prescribed plates and the General Trade Licence being properly *carried* used and displayed.

In construing an Act of Parliament and the Regulations made under the Act, it is a sound rule to give

the same meaning to the same word occurring in different parts of the Act or Regulations, and the rule applies with greater stringency when the word is repeated in the same section or paragraph. If what Mr. Brown suggested is the true meaning of the article, it is very strange that it does not say so in plain terms. In my opinion the word "carry" is used in its natural and ordinary meaning, and there can be no question of inconsistency or repugnance between the article and section 24.

In its application the article is limited to cases in which the prescribed plates and licences are being *properly carried used and displayed* under a General Trade Licence. In such cases no other identification mark or licence need be carried. If, however, the vehicle is used on the roads for the carriage of goods, then it is not being *properly* used under a General Trade Licence, and a Goods Vehicle Licence is required under section 24.

The question, therefore, will be answered in the negative and the case will be remitted to be dealt with according to law.

SHEIL J. [having stated the facts continued]:—

In 1934 the Parliament of Northern Ireland enacted the Motor Vehicles and Road Traffic Act (Northern Ireland), Part III of which was concerned with the licensing and regulation of goods vehicles. Section 24 provided that, subject to the provisions of Part III of the Act, a person should not use a goods vehicle on any public highway for the carriage of goods unless there should be in force with respect to the vehicle a licence granted by the Ministry of Home Affairs, and section 54 (1) defined "goods" as "including goods "or burden of any description." The same sub-section defined a goods vehicle as meaning a motor car constructed or adapted for use for the carriage of goods or a trailer so constructed or adapted. Sub-section (3) of section 24 made certain exceptions, but it was not, and could not be contended before this court that any of these exceptions applied.

Having regard to the description of the vehicle concerned in this case, and to the fact that it was carrying a motor car which was certainly a burden, it is clear that unless some amendment of section 24 or some relaxation of its provisions is to be found, the vehicle was a goods vehicle, and was being used on the public highway for the carriage of goods. It was not suggested otherwise in argument.

Section 24 contains (subject to the exceptions mentioned) a complete prohibition from using a goods vehicle on a public highway unless there is in force with respect to that vehicle a Goods Vehicle Licence granted under section 25 by the Ministry of Home Affairs. Has that prohibition been relaxed by article E. of regulation 29 of the Regulations above mentioned?

In my opinion the question must be answered in the negative. Apart from the argument advanced for the prosecutor that the 1947 Regulations deal only with the registration and licensing under what I may describe as the Taxation code referring to mechanically-propelled vehicles, it seems to me that the article relied on at petty sessions does not even suggest that the holder of a General Trades Licence is, by reason thereof, exempt from the necessity of having a Goods Vehicle Licence if his vehicle is, in fact, constructed or adapted for use for the carriage of goods. The article means what it says, viz., that while the General Trades plates are being carried and the General Trades Licence displayed, as required by regulation 29 (4), and the licence being properly used, as required by articles C. and D., it shall not be necessary to carry any other identification mark or licence in respect of the vehicle. The word "carry" in article E. must be construed in the same sense and meaning as the word "carried" in the same article, and paragraphs (4) and (5) of regulation 29, of which article E. is a part, clearly showed what "carried" means.

Reference was made to paragraph (4) of article D. That paragraph provides that the conditions of a General Trade Licence are not broken by user of a vehicle operating under such Licence so long as such

user is in the way of the licencees' business. It is concerned only with the General Trades Licence.

For these reasons I agree that the case should be remitted to the Petty Sessions.

Appeal allowed.

Solicitor for the appellant : *Chief Crown Solicitor.*
Solicitors for the respondent : *Hamill, Davison & Co.*

J. McC.

REX v. HENRY BROWNE (1).

Criminal Law—Practice—Sentence—Prisoner arraigned for murder pleading guilty of manslaughter—Plea accepted—What facts should be considered in assessing sentence—Whether severe sentence may be imposed in case of manslaughter committed under influence of drink.

A prisoner arraigned on indictment charging him with murder pleaded not guilty of murder but guilty of manslaughter, on the ground that at the time of the act he was under the influence of drink to such an extent as to be incapable of forming the intent requisite for murder. This plea was accepted with the approval of the trial judge who, after hearing some evidence and submissions on behalf of the prisoner, imposed a sentence of twelve years' penal servitude.

The prisoner appealed against the sentence on the grounds that it was excessive in the circumstances, and based on wrong principles in that the trial judge had taken into consideration matters which were irrelevant in view of the acceptance of the plea, and matters not fully proved in evidence or by the depositions.

Held, (i) that although the acceptance of the plea ruled out all facts which tended to show any intent negatived by that plea, nevertheless the trial judge was bound to consider all the circumstances of the case, and in so doing was entitled to have regard to the degree of knowledge of the accused at the time of the commission of the offence.

(ii) that the trial judge was wrong in taking into account matters which were not proved with a sufficient degree of certainty in the depositions nor in evidence but which were merely possible inferences from the facts before him.

(iii) that there is no rule that a severe sentence should not be imposed in a case of manslaughter committed under the influence of drink.

(iv) that it was the duty of the Court of Criminal Appeal to consider for itself on the material before it what was a proper sentence to be imposed, and having done so the court considered that the sentence imposed by the trial judge was not excessive and should be affirmed.

APPEAL AGAINST SENTENCE.

The prisoner was indicted before Sheil J. at the Belfast City Commission for the murder of his wife. The depositions showed that having arrived home in the early hours of the morning in a state of intoxication

(1) In the Court of Criminal Appeal before Andrews L.C.J. and Porter and Black L.JJ, November 1, 2, 7, 18, 1949.

he made a savage and prolonged attack on his wife, inflicting injuries which proved fatal. A doctor who arrived at 7-30 a.m. found that she had been dead several hours. Later examination of the premises showed *inter alia* that there were bloodstains on the gas stove, that there was human hair on one of the gas taps, and that the oven trays were upset.

On arraignment the prisoner pleaded not guilty of murder but guilty of manslaughter, which plea was accepted with the consent of the trial judge on the basis that there was evidence that the prisoner was so drunk at the time of the offence as to be incapable of having formed the intent requisite for murder. The judge heard submissions on behalf of the prisoner and evidence from two doctors and three police officers, and then imposed a sentence of twelve years' penal servitude. During the evidence the judge had expressed the opinion that the prisoner was *compos mentis* when he left the licensed premises (where it was alleged that he had become intoxicated), and when passing sentence he said that it might well be that the prisoner had attempted to gas his wife, and he referred to " a certain element of deliberation " on the part of the prisoner.

The prisoner appealed on the grounds that the sentence was excessive and based on wrong principles, in that the judge's remarks showed that he took into account matters rendered irrelevant by the acceptance of the plea and matters which were not fully proved in evidence nor by the depositions but which were merely possible inferences from matters so proved.

McSparran K.C. (with him *Brown*) for the appellant.

In the case of a killing under the influence of drink the acceptance of a plea of manslaughter can only be justified if the accused were so drunk as not to have known what he was doing. See *R. v. Meade* (1) as modified by *Director of Public Prosecutions v. Beard* (2) in which Birkenhead L.C. disapproved of so much of

(1) [1909] 1 K.B. 895. (2) [1920] A.C. 479.

Meade's case as relates to the accused's knowledge that what he was doing was wrong.

When a prisoner pleads guilty to a lesser offence than that charged he is in the same position as if he had been found not guilty of the greater offence but guilty of the lesser by a jury, and he should be sentenced only on the basis of the lesser offence: *R. v. Raper* (1). In *R. v. McKee* (2) it was held that the acceptance of a plea of manslaughter on the facts of that case precluded the judge from regarding the killing as either accidental or deliberate, and compelled him to treat it as a case of negligent killing. In this case the plea implies the absence of any intent; even negligence is ruled out. The learned trial judge, however, showed by his remarks that he thought the accused was not so drunk as had been suggested, and referred to a "certain "element of deliberation." These matters all went to the question of intention and were therefore rendered irrelevant by the plea accepted.

Even if the evidence as to the accused's state of mind is admissible the learned judge had no right to draw the inference that he had attempted deliberately to gas his wife. The facts are equally consistent with the theory that the blood and hair got on to the gas stove accidentally in the course of an attack made by the accused while bereft of his reason.

In view of the fact that the prisoner should only be sentenced on the basis of manslaughter the sentence is excessive. The trend is against severe sentences: see *R. v. Duerden* (3), *R. v. O'Connell* (4). [He also referred to *R. v. Keefe* (5), *R. v. Letenock* (6), *R. v. Hall* (7), *R. v. Bright* (8). Black L.J. referred to *Lord Advocate v. Campbell* (9).]

McCoy K.C. for the Crown. The trial judge was not wrong in any respect. He clearly indicated that he was distinguishing between murder and manslaughter. It

(1) (1922) 16 Cr. App. R. 195.
(2) [1947] N.I. 27.
(3) (1942) 28 Cr.App. R. 128.
(4) (1909) 2 Cr.App.R. 11.
(5) (1918) 13 Cr.App.R. 174.
(6) (1917) 12 Cr.App.R. 221.
(7) (1928) 21 Cr.App.R. 48.
(8) [1916] 2 K.B. 441.
(9) [1921] S.C. (J.C.) 1.

had been urged in mitigation that the accused's reason was dethroned at the time of the offence, and the trial judge was merely setting against that contention the fact that there was some element of consciousness, as he was entitled to do, for he was bound to take into account all the circumstances in order to determine the gravity of the offence. *R. v. McKee* (1) is not applicable to this case.

[ANDREWS L.C.J. : It applies to this extent, that the plea excludes the consideration of intent.]

That was a case of either deliberate killing or culpable negligence. Here there is no question of negligence, and the only question is whether the accused was conscious of what he was doing, and the learned judge was entitled to look at the evidence on this point as being in aggravation of the offence, though not as evidence showing an intent excluded by the plea.

Even if the judge was not entitled to take these matters into account, there were sufficient circumstances in this case to merit the severest punishment. Where the court has discretion as to the penalty the maximum penalty is reserved for the worst cases : see per Jelf J. in *R. v. Harrison* (2). No case could be worse than the present without being murder.

McSparran K.C. in reply. The court should in measuring the sentence set aside the horrible details of the crime. The harm done is to be considered, of course, but in this case the judge attributed too much to the accused. The gassing incident could have been controverted, and the Crown admit that the evidence is not conclusive.

Cur. adv. vult.

ANDREWS L.C.J. : The judgment which I am about to deliver is the judgment of the court.

The appellant, Henry Browne, was indicted before Sheil J. at the Belfast City Commission for the murder of his wife, Sarah Elizabeth Browne, on the 3rd of May, 1949. On being arraigned he pleaded not guilty of murder but guilty of manslaughter. This plea was

(1) [1947] N.I. 27. (2) (1909) 2 Cr.App. R. 94.

accepted by the Crown with the consent of the learned judge, who, after hearing the submissions of the appellant's counsel and the evidence of Dr. J. A. L. Johnston, Dr. P. P. O'Malley and three police officers, sentenced the prisoner to twelve years' penal servitude.

The appellant carried on business at premises situated at No. 33 Springfield Avenue, Belfast. These premises consisted of a shop, kitchen, scullery and pantry on the ground floor, and three rooms furnished as dwelling accommodation upstairs. From the depositions it appeared that the appellant arrived at these premises shortly after midnight on the morning of Tuesday, the 3rd May, 1949, and that sometime after securing admittance he made a savage attack on his unfortunate wife, inflicting on her injuries of the most shocking description from which she died several hours before the doctor arrived about half-past seven in the morning. The justification for the acceptance of the plea of manslaughter was that the evidence contained in the depositions went to show that the appellant was in an advanced state of intoxication before his arrival home at the Springfield Avenue premises on the fatal night ; and it was apparently considered that a jury directed in accordance with the principles laid down in *Rex v. Meade* (1) and *Director of Public Prosecutions v. Beard* (2) could not be expected, in view of the evidence in regard to the appellant's condition, to bring in a verdict of guilty of murder.

The grounds of the appeal are that the sentence is manifestly excessive in the circumstances ; that the trial judge acted on wrong principles in assessing the sentence having regard to the offence to which the accused pleaded guilty ; that the trial judge had regard to matters which were irrelevant to the charge of manslaughter ; and that in sentencing the accused he had regard to facts not established in evidence or in the depositions.

When, upon a charge of murder based upon an intention to kill or to do grievous bodily harm, it appears that the accused was drunk at the time of the

(1) [1909] 1 K.B. 895. (2) [1920] A.C. 479.

crime the principles to be applied in determining his criminal liability are not in doubt. They have been expounded with authority by the English Court of Criminal Appeal in *Rex v. Meade* (1) and by the House of Lords in *Beard's case* (2). The mere fact that the accused's mind was affected by drink so that he more readily gave way to some violent passion will not serve to rebut the presumption that he intended the natural consequences of his acts or to reduce his crime to manslaughter. On the other hand, a condition of drunkenness on the part of the accused may have the effect of reducing the crime to manslaughter if it appears that by reason of his drunken condition the accused was incapable of forming the specific intent which is an essential ingredient of the crime of murder. Mr. McSparran, on behalf of the appellant, accordingly argues that once the plea of manslaughter was accepted the judge's duty was to treat the case as one in which any intention on the part of the accused to do grievous bodily harm had been negatived, and he contends that a number of observations made by the learned judge go to show that in assessing the sentence of twelve years' penal servitude he proceeded on the basis that there were elements in the case showing an intent which was inconsistent with the reduction of the crime from murder to manslaughter.

We agree that when on a charge of a graver offence a plea of guilty to a lesser offence is accepted, care must be taken by the judge when assessing sentence to exclude any possible suggestion of the existence of an intent which is an element of the graver offence, but not of the lesser : *Rex v. Raper* (3). In a case such as the present where a crime, which prima facie amounted to murder, is reduced to manslaughter either by the verdict of a jury or by an acceptance of a plea to the lesser offence, and the justification for such reduction is the drunken condition of the accused at the time of the commission of the crime, the judge in passing sentence should treat the case as one in which there

(1) [1909] 1 K.B. 895.
(2) [1920] A.C. 479.
(3) (1922) 16 Cr.App.R. 195.

was an absence of specific intent which differentiates the crime of murder from the crime of manslaughter.

Mr. McSparran's criticism of the principles upon which Sheil J. fixed the sentence which he imposed is based on the learned judge's own indication of the matters which he took into consideration, and to which he adverted when passing sentence. In the first place Mr. McSparran directs attention to the learned judge's statement that there was evidence from which he drew the inference that it might well be that at some stage of the dreadful occurrence the accused tried to gas his wife and that that evidence conveyed to his mind a certain element of deliberation. Mr.McSparran criticises this on two separate grounds : he submits that the evidence in the case does not justify this inference, and he further contends that the statement by the learned judge, that the evidence and the inference drawn by him conveyed to his mind a certain element of deliberation, shows that he was proceeding on the basis of the existence, to some degree at any rate, of the intent which is an element of the crime of murder but not of manslaughter. The second matter upon which Mr. McSparran relies is the learned judge's statement that it would appear that the accused had a fairly clear recollection of the row, so that it might well be that he was not in such a drunken condition as had been suggested. This again, Mr. McSparran contends, shows that the judge was treating the matter as though there was evidence, on which he was justified in relying, of an intent which had been negatived by the acceptance of the plea of manslaughter. His contention, as we understand it, is that, the plea of manslaughter having been accepted, it was the learned judge's duty in assessing sentence to rule out any evidence which went to show that the accused had any recollection or knowledge of the events of the fatal night and certainly not to rely on such evidence as manifesting any intent on the part of the accused to inflict bodily harm upon his wife.

Dealing with this second matter first we agree that the learned judge was not entitled to rely on such

evidence of the accused's recollection or knowledge as manifesting an intent which had been negatived by the acceptance of the plea of manslaughter. But on careful perusal of the proceedings at the trial we have not been convinced by Mr. McSparran that the judge was seeking to utilise the evidence for such purpose. The crime of manslaughter is one which in some cases may demand a very heavy punishment and which in other cases may be adequately dealt with by a relatively light sentence. The tribunal which has the task of assessing the sentence must look to all the circumstances of the particular case. One of the circumstances to which it is entitled to have regard (whatever may be the weight which it may be legitimate to attach to it) is the degree of knowledge of the accused at the time of the commission of the crime. If it had been clearly established that the accused, at the time of the commission of the crime, had been labouring under such a defect of reason, even though caused by drunkenness, that he did not know the nature and quality of the acts which he was doing, this would have entitled him to put forward the defence of insanity which would have negatived any mens rea at all on his part. (*Reg. v. Baines* quoted by Lord Birkenhead L.C. in *Director of Public Prosecutions v. Beard* (1).) The defence of insanity, however, was not raised or suggested, and accordingly we do not think that it is open to the appellant's counsel to claim that the learned judge should have proceeded on the basis that the accused did not know the nature or quality of his acts or to contend that all evidence suggesting any degree of knowledge on his part should have been disregarded. Accordingly, we do not think that the learned judge took anything irrelevant into account in having regard to the evidence that the accused had some degree of recollection and knowledge of what had occurred.

As regards Mr. McSparran's first contention, we have carefully considered the evidence contained in

(1) [1920] A.C. 479, 501.

the depositions regarding the state of affairs which the police discovered at the gas cooker in the scullery. The door of the oven was fully open ; on the tap which turns on the gas to supply the oven there was a fairly large bunch of human hair ; on the other three taps there was blood ; and on the oven door and inside the oven there were also spots of blood, while, on the floor immediately in front of the oven there was a fairly large pool of blood. When passing sentence the learned judge said that this evidence suggested to his mind the possibility that at some stage the accused tried to gas his wife. While at first, however, the judge spoke of this as merely a possibility, it would appear from his later expressions that he had founded somewhat upon the matter when deciding upon the length of the sentence which he should impose. He says that the state of affairs at the gas oven had the effect of conveying to his mind a certain element of deliberation. While the inference drawn by the learned judge is certainly a possibility, we do not think that it can be drawn with such a degree of certainty as to justify it in being taken into account against the accused man in assessing sentence. Accordingly, in considering the proper sentence to be imposed this court will decline to have regard to any inference that the accused may have attempted to gas his wife.

The learned judge's observations in regard to this part of the case are also criticised on the ground that they show that he was proceeding on the basis that the evidence showed intent on the part of the accused to injure his wife. The phrase relied upon is the judge's statement in passing sentence that the state of affairs at the gas cooker conveyed to his mind a certain element of deliberation. If this phrase means that the judge was attributing to the accused an intent which is an element of the crime of murder but which is absent in the crime of manslaughter we agree that it is wrong to measure sentence on such a basis. We are not certain, however, that this was the learned judge's meaning. An act may be spoken of as deliberate to convey that it was not merely negligent or merely

automatic. A killing may be deliberate or wilful in this sense, without necessarily involving the intent which is an element of the crime of murder. In the case of *Reg. v. Doherty* (1) the prisoner was indicted for wilful murder by shooting with a revolver. The defence was one of drunkenness, coupled with the contention that the accused was merely negligent. In his charge to the jury, which is apparently accepted by Lord Birkenhead in *Beard's case* (2) as an accurate exposition of the law, Stephen J. is reported as saying (3) : " If, gentlemen, you convict the prisoner of " manslaughter, I must ask you to be good enough to " say whether you mean manslaughter by violence " wilfully inflicted, or by culpable negligence, for, of " course, it will make a considerable difference in the " punishment." In the result the jury found the prisoner not guilty of murder but guilty of manslaughter with wilful violence. It accordingly appears that so great an authority on criminal law as Stephen J. saw nothing inconsistent in using the phrase " violence " wilfully inflicted " in relation to a case of this type when dealing with a possible verdict of manslaughter and not murder.

However this may be, it is still the duty of this court on this appeal to consider for itself on the material before it what is the proper sentence which should be imposed in all the circumstances of the case. The material on which we have to proceed is the evidence contained in the depositions, which has not been challenged, and the further evidence given by the witnesses before Sheil J. It was suggested at one stage of the argument by counsel for the accused that the reported decisions indicated that a sentence so severe as that imposed by the trial judge should not normally be imposed where a charge has been reduced from murder to manslaughter on account of the drunkenness of the accused. We do not, however, know of any rule to this effect. In *Lord Advocate v. Campbell* (4), tried shortly after the decision of the

(1) (1887) 16 Cox. C.C. 306.
(2) [1920] A.C. 479, 498.
(3) (1887) 16 Cox. C.C. at p. 309.
(4) [1921] S.C. (J.C.) 1.

House of Lords in *Beard's case* (1), the Lord Justice Clerk, Lord Scott Dickson, imposed a sentence of twelve years' penal servitude in a case, the circumstances of which have a considerable resemblance to those of the present case. And in *Beard's case* (1) the Court of Criminal Appeal, when holding that the conviction of murder ought to be quashed and a verdict of manslaughter substituted, imposed a sentence of twenty years' penal servitude.

The appropriate sentence in any case must depend on the circumstances of that particular case. The present case cannot be regarded as other than one of great gravity. The state of the premises when the police arrived in the morning and the terrible injuries inflicted upon the unfortunate victim show how savage and violent must have been the assault which caused her death. Moreover, the evidence of the accused's statement to Dr. O'Malley, the substantial accuracy of which was not disputed, shows that the accused was conscious to some extent of the assault which he was committing on his wife, and that this last attack was the culmination of a whole series of assaults on his wife while he was under the influence of drink, one of which was apparently so serious that she had to be treated in the Royal Victoria Hospital. That the accused had in recent years been given to excessive drinking there can be no possible doubt. Since the beginning of 1942 he had been five times in the hands of the police for offences involving drunkenness. The terrible crime to which he pleaded guilty was obviously one for which it was the duty of the Court to impose a heavy sentence. Sheil J. after giving the case anxious consideration fixed the sentence at twelve years' penal servitude. As is our duty, we have considered the matter for ourselves; and while we disregard the inference which the learned judge was disposed to draw, that at some state of the dreadful affair the accused tried to gas his unfortunate wife, and while we also exclude any idea of the existence of any such intent as would have made the crime not man-

(1) [1920] A.C. 479.

slaughter but murder, we have come to the conclusion that the sentence of twelve years' penal servitude is not excessive, and that it accords with the gravity of the offence in respect of which it was imposed.

The appeal will accordingly be dismissed, but we shall allow the sentence to run from the date of conviction.

Appeal dismissed.

Solicitors for the appellant : *Bernard Campbell & Co.*

Solicitor for the Crown : *Chief Crown Solicitor.*

J. P.

GALLOWAY v. IRISH SAILORS AND SOLDIERS LAND TRUST (1).

Housing—Housing Act (Northern Ireland), 1948 (12 & 13 Geo. 6, c. 9), s. 4—Construction—Whether retrospective—Nature of rights conferred by the Rent Acts—Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940 (4 Geo. 6, c. 7).

The effect of section 4 of the Housing Act (Northern Ireland), 1948, is thereafter to exempt from the provisions of the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940, all houses of the Irish Sailors and Soldiers Land Trust whether provided before or after the passing of the Act of 1948.

Per Porter L.J.: Such a construction is not objectionable on the ground that it affects vested rights restrospectively, because the rights of tenants under the Rent Acts remain inchoate until the landlord purports to increase the rent or serves a notice to quit.

Observations on the use of the long title of a statute as an aid to its interpretation.

APPEAL from an order of Black L.J. sitting in the Chancery Division.

Under a tenancy agreement of 1936 the plaintiff was a tenant of a house owned by the defendant Trust, a body corporate established by s. 3 of the Irish Free State (Consequential Provisions) Act, 1922, to carry out the functions of providing houses for ex-servicemen of the 1914-1918 war, which functions had been carried out before 1922 by local authorities under the Irish Land (Provision for Sailors and Soldiers) Act, 1919. The house was within the scope of Part II of the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940, and on the passing of that Act the plaintiff became entitled to the protection thereby provided. In 1948 the Housing Act (Northern Ireland) Act, 1948, the long title of which is: "An Act to make "certain amendments in the law relating to housing; "to exempt houses of the Irish Sailors and Soldiers "Land Trust from the provisions of the Rent and "Mortgage Interest (Restrictions) Act (Northern Ire- "land), 1940; and for purposes connected with the

(1) In the Court of Appeal before Andrews L.C.J., Porter L.J. and Sheil J., November 14, 15, 21, 22, 23, 1949; January 19, 1950.

" matters aforesaid " provided in s. 4 : " The Rent and " Mortgage Interest (Restrictions) Act (Northern Ire- " land), 1940, shall not apply to any housing accom- " modation provided by the Irish Sailors and Soldiers " Land Trust so long as that accommodation remains " in the ownership or otherwise under the control of " the said Trust."

After the passing of the Housing Act (Northern Ireland), 1948, the Trust sent to the plaintiff a letter which stated that the rent of 6*s.* 8*d.* per week, inclusive of rates, which he had been paying had become an uneconomic rent, and requested him to sign a new tenancy agreement the effect of which was to raise the rent to 10*s.* 11*d.* per week inclusive of rates, but subject to a variation each year according to increases or reductions in the rates payable by the Trust. The plaintiff claimed the protection of the Rent Acts and refused to sign the new agreement. Later the plaintiff paid the increased rent —then 11*s.* 3*d.*—under protest, and took out an originating summons in the Chancery Division to determine the following question :—

" Whether upon the true construction of the " Housing Act (Northern Ireland), 1948, section 4 " thereof has retrospective effect so as to deprive " tenants of houses provided by the defendants, " whose tenancies were created before the com- " mencement of the said Act, of the protection " provided by the Rent and Mortgage Interest " (Restrictions) Act (Northern Ireland), 1940."

Black L.J., in a reserved judgment, held that the intention of the Legislature was to add a further exemption to those set out in s. 3 of the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940, and that the word " provided " should be read as adjectival. As he considered that such a construction did not properly involve a retrospective effect he deleted the word " retrospective " from the summons and answered the question in the affirmative. The plaintiff thereupon appealed.

Patton K.C. (with him *Reid*) for the appellant. If the word " provided " in this section is to be taken as adjectival the concluding words are rendered superfluous, but the rule is that statutes should be read so as to give effect to every word if that is possible. We must therefore take the word as being adverbial, and when taken thus it is grammatically capable of meaning " shall be provided," " shall have been provided," or both of these. If it be taken to include " shall have " been provided," as the Trust must contend, the section will have a retrospective effect, even though only to a minor extent. There are degrees of retrospectivity as is seen by comparing s. 3 (7) of this Act with s. 1 (1). It is well settled that a statute which is not merely procedural or declaratory should not be construed as to have retrospective effect in the absence of clear words, for such a construction would affect vested rights: *Gardner v. Lucas* (1), *Moon v. Durden* (2), *Reid v. Reid* (3), *Ward v. British Oak Insurance Co.* (4). Moreover, the statute should not be construed so as to have a greater retrospective effect than its language requires. In this section there are no words to indicate that it should have retrospective effect, while in other sections the Legislature's intention is clearly expressed.

As for the long title, upon which the Trust relies, it should only be referred to in cases of doubt, of which this is not one. It says only that the Act is to " exempt houses of the . . . Trust," and this does not imply all houses of the Trust, or that they should all be exempted forthwith. Even such a word as " all " or " any " would not suffice to oust the presumption against retrospective effect: *Vansittart v. Taylor* (5). Apart from this, " provided " means " made available " to tenants," and the section will eventually cover all houses of the Trust as the present tenants leave and new tenancies are created. The reason for the differentiation between former tenants and new tenants

(1) (1877) 3 App. Cas. 582.
(2) (1848) 2 Ex. 22.
(3) (1886) 31 Ch.D. 402.
(4) [1932] 1 K.B. 392.
(5) (1855) 4 E. & B. 910.

is that the former have arranged their affairs on the basis of their having rights under the Rent Acts, whereas new tenants will be aware that they have no such rights.

The section is a pro tanto repeal of the Rent Act, 1940, and as such should not be construed as to take away rights acquired under that Act : see Interpretation Act, 1889, s. 38 (2) (*c*) and *Bowling v. Camp* (1). In order to decide against the appellant it will be necessary to hold not only that the section is capable of bearing the construction urged by the respondents, but that it is incapable of bearing the construction which the appellant urges : if there are two possible constructions the one which does not involve retrospective effect should be chosen : *Gardner v. Lucas* (2), *Gardner & Co. v. Cone* (3).

Harrison K.C. (with him *Gibson*) for the respondents. The section is plain and no recourse to the canon against retrospective effect is permitted because the language is not equivocal : see per Scott L.J. in *Davies v. Warwick* (4). If there is equivocation the long title may be used to resolve the ambiguity : *Vacher v. London Society of Compositors* (5). Here the long title says that one of the objects of the Act is " to exempt " houses of the . . . Trust " which must mean all houses of the Trust for it is not limited in any way.

The general scope and purview of the Act may be used to assist in the construction : *Pardo v. Bingham* (6). The Legislature obviously meant to deal with the same subject matter as was referred to in the Irish Land (Provision for Sailors and Soldiers) Act, 1919, and there is no doubt that the " provision " referred to in s. 5 (4) of that Act is descriptive, and once accommodation is " provided " it remains " provided."

The intention was to add a further exemption to s. 3 (2) of the Rent Act, 1940, but this does not constitute a repeal for the purposes of s. 38 (2) of the

(1) (1923) 128 L.T. 342.
(2) (1877) 3 App. Cas. 582.
(3) [1928] Ch. 955.
(4) [1943] K.B. 329, 332.
(5) [1913] A.C. 107, 128-9.
(6) (1869) L.R. 4 Ch. 735, 740.

Interpretation Act, 1889. The Legislature might repeal a part of the Rent Acts in a Housing statute, but it is improbable.

The rule that a statute should not be construed so as to affect vested rights is not questioned, but the rights involved in the cases cited are quite different from any rights which a tenant may have under the Rent Acts which merely suspend the landlord's common law rights and operate *in rem: Wirral Estates Ltd. v. Shaw* (1), *Rudler v. Franks* (2), *Welby v. Parker* (3); whereas the authorities cited all deal with rights *in personam*. The Rent Acts do not give a tenant any vested rights, but merely improve his position temporarily: *Keeves v. Dean* (4).

If the appellant be right the section will scarcely operate at all for a controlled house will not come within it until the death of a protected tenant and a widow or other relative, who is not a proper object of the Trust will be protected. To divide the Trust's tenants into two classes would produce unfair discrimination.

Patton K.C. replied.

Cur. adv. vult.

ANDREWS L.C.J.: The question in issue in this case may be briefly stated as what is the meaning which ought to be attached to the word "provided" in section 4 of the Housing Act (Northern Ireland), 1948. Narrow though this issue is a mass of authority was cited to us during the five-day argument which was directed, not so much to the actual meaning of the word, as to the principles underlying the construction of statutes. These authorities I have carefully considered, but I find it unnecessary to refer to them at length in this judgment. The difficulty, such as it is in this case, lies not in the principles, which are both clear and well established, but rather in their application to the facts of the case. Let me, therefore, briefly refer in the first instance to the material facts.

(1) [1932] 2 K.B. 247.
(2) [1947] K.B. 530, 532.
(3) [1916] 2 Ch. 1.
(4) [1924] 1 K.B. 685, 686.

The respondents are a body corporate, who were established by section 3 of the Irish Free State (Consequential Provisions) Act, 1922, for the purpose of providing in Ireland cottages, with or without plots or gardens, for the accommodation of men who served in any of His Majesty's forces in the then late war. For such purposes it was provided that the defendants should have all the powers which are conferred upon the Local Government Board for Ireland by section four of the Irish Land (Provision for Sailors and Soldiers) Act, 1919. In particular, sub-section (1) of section 4 it was enacted that the Local Government Board should have power to make and carry out schemes for the provision of cottages with or without plots or gardens for the accommodation of men who have served as aforesaid and who should satisfy the Board as to their fitness and suitability.

Many cottages were erected, and accommodation was so provided under the statutory power referred to. One of these houses, known as 77 Brandon Parade, Belfast, was by written agreement of the 2nd July, 1936, let to the appellant at the rent of 6*s*. 8*d*. per week, and it is still in his occupation. It is admitted that this house, not having been erected until after the 2nd April, 1919, was, at the time of such letting (like all other houses provided by the respondents) not controlled or in any way subject to the provisions of the Rent and Mortgage Interest (Restrictions) Acts. Later, however, it fell within the wider provisions of section 3 of the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940; and, admittedly also, it remained subject to such provisions until the passing of the Housing Act (Northern Ireland) 1948, already referred to.

The first three sections of the said Act of 1948 effect certain amendments in the law relating to housing as contained in the Housing Acts code 1890 to 1946, with which the Act of 1948 is, by section 5 (2), to be construed as one. This being the main object of the Act, section 4, which in no way relates to that code, and is designed to effect an amendment of section 3 of

the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940, is obviously somewhat out of place. It reads as follows :—

" The Rent and Mortgage Interest (Restrictions) " Act (Northern Ireland), 1940, shall not apply to " any housing accommodation provided by the Irish " Sailors and Soldiers Land Trust so long as that " accommodation remains in the ownership of or " otherwise under the control of the said Trust."

These proceedings, instituted by way of originating summons, have their origin in a request made to the appellant by the respondents that he should sign a new tenancy agreement providing for the payment in respect of his said house of an increased rent of 10*s.* 11*d.* per week. This the appellant declined to do, contending that he was protected in his tenancy by the said Rent (Restrictions) Act, 1940, notwithstanding the provisions of the said Housing Act (Northern Ireland), 1948. We are not concerned with the merits of the respondents' claim for such increased rent further than to say, as a matter of historical interest, that the original rent of 6*s.* 8*d.* was expressed to be inclusive of municipal rates ; and these, like the cost of repairs for which the respondents were also liable, had risen in a manner which could not have been reasonably foreseen when the letting was made to the appellant in 1936. The financial position resulting from this and other lettings, made at what had become uneconomic rents, was, the respondents alleged, preventing them from carrying out their statutory duty to provide houses. Accordingly, they circularised all their tenants, including the appellant, by letter of the 25th February last, intimating that the rent must be increased to 10*s.* 11*d.* per week inclusive of municipal rates, such rent to be adjusted each year according to increases or reduction in the rates payable by the respondent, Trust. It appears in the affidavit of Mr. Brownell, a Principal Officer of the Ministry of Finance, that 883 tenants out of a total of 1,251 tenants of the Trust in Northern Ireland signed the proposed form of tenancy agreement ; and, though the appellant refused to do so.

he has since paid the new rent (now adjusted to 11*s.* 3*d.* per week) under protest. Such matters, I repeat, though relevant to be stated, cannot affect our problem —the true construction of section 4 of the Housing Act (Northern Ireland), 1948.

The question submitted to Black L.J. was in form as follows :—

" Whether upon the true construction of the " Housing Act (Northern Ireland), 1948, section 4 " thereof has retrospective effect so as to deprive " tenants of houses provided by the defendants, " whose tenancies were created before the com- " mencement of the said Act, of the protection " provided by the Rent and Mortgage Interest " (Restrictions) Act (Northern Ireland), 1940."

This question the learned judge amended by the deletion of the word " retrospective," which he considered objectionable as in a measure at least begging the question, and, therefore, inappropriate. As so amended, he answered the question in the affirmative ; and it is from this decision that the present appeal is brought.

In my opinion the net issue to be determined simply is, what is the subject-matter of the section ? What is its scope ? What did Parliament intend to legislate in respect of when it referred to " any housing accom- " modation provided by the . . . Trust ".

The appellant's counsel, Mr. Patton, contended that the word " provided " means " made available," and that the section only applies to houses so provided by the Trust subsequent to date of the passing of the Act of 1948, namely, the 8th June, 1948, It includes, he admits, houses built before, but which have passed into the hands of the Trust and been relet to new tenants, after the passing of the Act. To this extent, but only to this extent, has the section, in his submission, a retrospective operation. Until such re-letting, he contends, any house of the Trust, built before the Act of 1948 and let to a tenant, remains subject to the Rent Restrictions Act, 1940. On behalf of the respondents, on the other hand, it is contended

that the placing of such a construction upon the section would defeat the obvious intention of Parliament; that the words of the section are clearly intended to include all the houses of the Trust, whensoever built, or, to use the statutory word, whensoever "provided"; and that, if the section contains any doubt or ambiguity, such doubt or ambiguity is removed by the words of the long title to the Act.

The appellant's argument rested almost entirely on the acceptance and application of the principle that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act or arises by necessary and distinct implication. Perhaps this rule is as clearly and accurately expressed by Wright J. in *In re Athlumney, Ex parte Wilson* (1) as elsewhere in the many authorities cited by Mr. Patton: "A retrospective "operation," said the learned judge, "is not to be "given to a statute so as to impair an existing right "or obligation, otherwise than as regards matter of "procedure, unless that effect cannot be avoided "without doing violence to the language of the enact-"ment. If the enactment is expressed in language "which is fairly capable of either interpretation, it "ought to be construed as prospective only." Perhaps I should make one further citation of the principle as it is expressed in the oft-quoted judgment of Lindley L.J. in *Lauri v. Renad* (2): "It certainly "requires very clear and unmistakable language in a "subsequent Act of Parliament to revive or recreate "an expired right. It is a fundamental rule of English "law that no statute shall be construed so as to have "a retrospective operation unless its language is such "as plainly to require such a construction; and the "same rule involves another and subordinate rule to "the effect that a statute is not to be construed so as "to have a greater retrospective operation than its "language renders necessary." It is unnecessary to make further citation in support of a principle or rule of construction which cannot be controverted, and

(1) [1898] 2 Q.B. 547, 552. (2) [1892] 3 Ch. 402, 420-1.

which I did not understand Mr. Harrison to challenge as a well-accepted proposition of law in the argument which he addressed to us on behalf of the defendants.

Speaking in general terms the rule which leans against a retrospective operation has principally been applied where a statute would prejudicially affect what are designated as vested rights ; would interfere with the legality of past transactions ; or would alter the rights of parties in proceedings already instituted at the time that it became law. But the rule, like every rule of law, has its limitations. Thus, if the Act is in its nature a declaratory Act the argument that it should not be so construed as to take away previously existing rights is inapplicable. Further more, the presumption against a retrospective construction does not apply to a statute which affects only matters of court procedure and practice, even though the alteration effected by such statute has been prejudicial and disadvantageous to one of the parties. As Mellish L.J. said in *Republic of Costa Rica v. Erlanger* (1), "No suitor has any vested right in the "course of procedure." And so also, with greater relevance to the present case, is the well-established proposition that, whenever the intention of Parliament is clear that the Act should have a retrospective operation, it must unquestionably be so construed, even though the consequences may appear unjust and hard : *In re Williams and Stepney* (2) ; *Stead v. Carey* (3). It is a principle or canon of construction which only applies to equivocal language (per Scott L.J. in *Davies v. Warwick* (4)). The paramount object in construing statutes is to ascertain the legislative intent. It once this is clear it is not for the mere interpreter or administrator of the law to question the wisdom of Parliament, or to ignore its legislative decrees. The first chapter of *Maxwell's* standard work on the *Interpretation of Statutes* (8th Ed.) opens with the words :—" A statute is the will of the Legislature,

(1) (1876) 3 Ch.D. 62, 69.
(2) [1891] 2 Q.B. 257.
(3) (1845) 1 C.B. 496.
(4) [1943] K.B. 329, 332.

" and the fundamental rule of interpretation, to which " all others are subordinate, is that a statute is to be " expounded ' according to the intent of them that " ' made it'," In his speech in the well-known case of *Commissioners for Special Purposes of the Income Tax v. Pemsel* (1)—so often cited in charity cases—Lord Halsbury L.C. quotes and adopts the words of Tindal C.J. in the *Sussex Peerage Case* (2) :—" The only rule " for the construction of Acts of Parliament is, that " they should be construed according to the intent of " the Parliament which passed the Act. If the words " of the statute are in themselves precise and un- " ambiguous, then no more can be necessary than to " expound those words in their natural and ordinary " sense. The words themselves alone do in such " case best declare the intention of the lawgiver. But " of any doubt arises from the terms employed by the " Legislature, it has always been held a safe means of " collecting the intention, to call in aid the ground and " cause of making the statute, and to have recourse to " the preamble, which, according to Dyer C.J. (*Stowel v. Lord Zouch* (Plow. at p. 369) is a key to open the " minds of the makers of the Act, and the mischiefs " which they are intended to redress."

Now what, to take Tindal C.J.'s words, was " the " ground and cause " of enacting section 4 of the Act of 1948 ? What, to apply Lord Hatherley's test in *Pardo v. Bingham* (3) was " the purport and object of " the Legislature " ? What was the state of the law which the Legislature sought to reform ? In my opinion the intention of Parliament was merely to remedy an oversight on its own part which occurred when the Rent (Restrictions) Act of 1940 was passed. The generality of section 3 (1) of that Act was restricted by the proviso, clause (*e*) of which enacted that : " this " Part (i.e., Part II) of this Act shall not apply to any " dwelling house provided by a local authority under " the Labourers Acts (Northern Ireland), 1883 to " 1939." In its material operative words that clause

(1) [1891] A.C. 531, 543.
(2) (1845) 11 Cl. & F 85, 143.
(3) (1869) L.R. 4 Ch. 735, 740.

is identical with the words of section 4 of the Act of 1948 as applied to a different subject-matter. So also is it identical with the words of section 18 (2) (*h*) of the Rent (Restrictions) Act, 1920, and with the words of section 25 of the Housing Act (Northern Ireland), 1945, which latter section excluded the application of the Rent (Restrictions) Act, 1940, to any housing accommodation provided by a local authority under the Housing Acts, 1944 to 1945, or by the Housing Trust under the Act of 1945. It must, no doubt, be admitted that there is a difference between clause (*e*) in the proviso to section 3 of the Rent (Restrictions) Act of 1940 and section 4 of the Housing Act of 1948 in that in the former case the Rent (Restrictions) Act of 1940 never applied to dwelling-houses provided under the Labourers Acts, the exception from its provisions being made in the Act of 1940 itself. Accordingly, Parliament was not in that case depriving tenants of rights which they had already acquired. But, this difference notwithstanding, I rely upon both clause (*e*) in the Act of 1940 and section 25 in the Act of 1945 as evidencing a recognised form of language or a phraseology which Parliament deemed appropriate for the purpose of effecting a total exclusion from the Rent (Restrictions) Act, 1940,of houses at any time provided under the Labourers Acts or Housing Acts referred to. This is in my opinion of vital importance when considering the true interpretation of section 4 of the Housing Act (Northern Ireland), 1948.

Bearing these matters in mind I pass on to a closer consideration of the language of section 4. It opens with words indicative purely of futurity—the Rent (Restrictions) Act, 1940, "shall not apply . . ." There is no suggestion in these words that the Act never applied, or that it should be deemed never to have applied. The rights which existed between the Trust, as landlords, and their tenants between the dates of the passing of the two Acts of 1940 and 1948 are not disturbed in respect of that period. Had there been such a disturbance then the section would, indeed, have provided retrospective, or, as it has been also

called, retro-active, legislation in the true sense of that term. It was the intention of Parliament merely to alter such rights for the future. Rights and liabilities in respect of rent, repairs, and so forth, between the years 1940 and 1948 remained unaffected. In my opinion accordingly, it is a misuse of the term to call such legislation retrospective; and Black L.J. was in my opinion fully justified in deleting the word "retro-" spective" from the question submitted to him before he answered it.

We next come to the really important words of the section "provided by the . . . Trust." My first observation in connection with these words is that, unlike the word "apply," the word "provided" is not preceded by any words suggestive only of futurity. Neither, be it admitted, is it accompanied by any words necessarily indicative of the past. The reason for this is, I think, obvious. Parliament was not legislating merely in respect of housing accommodation which had been provided by the Trust in the past, *or* in respect of such accommodation as might be provided by the Trust in the future. The phraseology adopted of "housing accommodation provided" is taken from section 4 (1) of the Irish Land (Provision for Sailors and Soldiers) Act, 1919, and section 3 (1) of the Irish Free State (Consequential Provisions) Act, 1922, already mentioned, both of which refer to the provision of cottages for the accommodation of such service-men. Accordingly, Parliament, when referring in section 4 of the Act of 1948, not merely to "housing "accommodation provided" but to "*any* housing "accommodation provided" was clearly legislating in respect of any houses at any time provided by the Trust under and in fulfilment of their statutory powers and duties. The generality of the section in respect of its subject-matter is apparent from the language employed. Curtailment could only be effected by the use of words which are not to be found in the section. The words used were not intended to have relation, or to be confined in their application, to any particular

period of time. Rather in my opinion are the words used of the subject-matter of the section in a descriptive or adjectival sense. The only limitation engrafted upon this wide meaning which I assign to the words " any housing accommodation provided " is that which is to be found in the concluding words of the section, namely, that the exemption of such houses from the provisions of the Rent (Restrictions) Act, 1940, should only continue so long as that accommodation remains in the ownership of or otherwise under the control of the Trust.

Such is in my opinion the clear interpretation of section 4—an interpretation at which I am able to arrive with complete confidence without travelling outside the section. In my opinion, therefore, the view presented by Mr. Patton on behalf of the appellant could not possibly at its highest do more than create a doubt or ambiguity of construction, in which case we are entitled to look for assistance at the words of the long title to the Act. The law in this respect as now accepted is different from what it was prior to 1854 when the practice of the House of Commons was altered by Standing Order 34, which for the first time authorised the House in Committee to amend the title. The title has now become a part, and an important part, of the Act (see judgment of Lindley M.R. in *Fielding v. Morley Corporation* (1)). Whilst it is true that Lopes L.J. in *Powell v. Kempton Park Racecourse Co.* (2) stated it as his opinion that " the title is no part of the "Act," yet he adopted the view expressed by Jessel M.R. in *Sutton v. Sutton* (3), that the title of an Act is always on the roll, and so may be looked at in order to remove any ambiguity in the words of the Act. To the like effect will be found the speech of Lord Moulton in *Vacher & Sons Ltd. v. London Society of Compositors* (4) and the judgment of Atkinson J. in *Rex v. National Arbitration Tribunal* (5).

Mr. Patton, whilst not disputing the right of the

(1) [1899] 1 Ch. 1, 3-4.
(2) [1897] 2 Q.B. 242, 265.
(3) (1882) 22 Ch.D. 511, 513.
(4) [1913] A.C. 107, 128, 129.
(5) [1941] 1 K.B. 584, 597.

court to look at the title of an Act if there be an ambiguity in its words, contends, first, that there is no ambiguity in section 4, and, secondly, that if the title be referred to in the present case it affords no assistance to the respondents. I have already dealt sufficiently with the first of these contentions ; and I am quite unable to accept the second. The material words of the title are " to exempt houses of the Irish " Sailors and Soldiers Land Trust from the provisions " of the Rent and Mortgage Interest (Restrictions) Act " (Northern Ireland), 1940." In these words we have the words of the section—" shall not apply to "—converted into and interpreted as " to exempt from " ; and the words " housing accommodation provided by " the . . . Trust " become " houses of the . . . Trust." Thus again in these different words it appears in my opinion as clear as language could reasonably make it that Parliament was legislating in perfectly general terms for all the houses which belonged to the Trust, and not to a mere section of such houses. There is no word in this title to the Act, any more than there is in the section itself, suggestive of a class sub-division of the houses of the Trust ; nor can I see any sufficient reason why such division should have been thought necessary. Such rights as the appellant acquired under the Rent (Restrictions) Act, 1940, were non-existent at the time that his tenancy was created. They were not something that he could have had present to his mind when making his bargain, and upon the basis of which he contracted. Rather were they something which he acquired subsequently and, I may say, fortuitously, by Act of Parliament. The attitude of Parliament in such circumstances may well have been that what they had so given, whether purposely or by oversight, they could reasonably take away without causing any real grievance or injustice, provided that the legislation did not disturb the tenants' right under the Act of 1940 in respect of the period which had intervened between the passing of that Act and the passing of the new legislation.

To have legislated otherwise than in regard to all

the houses at any time provided by the Trust would not have provided the Trust with the additional income from increased rents which was necessary to relieve them from the state of financial instability into which they had been plunged by the war and the subsequent post-war conditions ; and I have little doubt that this was, to borrow again the words of Tindal C.J., at least one of " the grounds and causes of making the statute." Further, any legislation which would have resulted in different conditions for different tenants would also have produced endless jealousies and practical difficulties in administration. This would have been particularly so if Mr. Patton's submission be right that the exemption of houses from the provisions of the Rent (Restrictions) Act, 1940, effected by section 4 of the Act of 1948 not only applied to houses erected and let to tenants after the passing of the Act of 1948, but that it also extended to such other houses of the Trust as were built prior to that date if and when " they came into the possession of the Trust after the " Act for letting to new tenants."

I shall conclude this judgment by saying that this " limited or retrospective operation " of the section, as Mr. Patton called it, is one which in no circumstances could I entertain. Neither in section 4 nor in the title is any reference to be found to future tenancies. In my opinion if the section were not fully retrospective in the sense of applying to all houses of the Trust, as I am satisfied that it is, the only possible alternative would be that it was not retrospective at all ; and I am convinced that Mr. Patton was forced into this illogical and, in my opinion, untenable position by the necessity for finding some answer to the respondents' argument that, unless the section be given such a retrospective character, there would, in these days of building difficulties and restrictions, be virtually no subject-matter upon which it could operate. To provide such subject-matter, as it seems to me, he submitted a construction of the section which he quite accurately stated would achieve as he said " in the fullness of time " the same exemption for the houses of the Trust as the

respondents' construction would effect "by one fell "stroke."

Mr. Patton also relied upon the provisions of section 38 (2) of the Interpretation Act, 1889, submitting that section 4 of the Act of 1948 effected a pro tanto repeal of section 3 of the Rent (Restrictions) Act, 1940. In my opinion section 4 does not amount to either a total or partial repeal of section 3 of the Act of 1940 within the meaning of that term as used in the Interpretation Act. It merely adds one more to the list of exceptions contained in the proviso to section 3. The judgment of Humphreys J. in *Director of Public Prosecutions v. Lamb* (1), to which Sheil J. referred during the argument, appears to me very helpful on this issue.

Taking the view which I do in regard to the clear intention of the relevant provisions of the Act of 1948, it is unnecessary for me to consider, as my colleague, Porter L.J., has so carefully done in the judgment which he will deliver, whether the rights claimed by the appellant under the Act of 1940 can be properly described, as Mr. Patton contended, as "accrued or "vested," or whether they may be more aptly designated as merely "abstract." Suffice it for me to say that my silence on this point is not to be construed as a tacit acceptance on my part of Mr. Patton's submission in this regard.

For the reasons which I have stated I am of opinion that the order of Black L.J. was in every respect correct, and that this appeal should be dismissed with costs.

PORTER L.J.: The respondents are a body corporate established by section 3 of the Irish Free State (Consequential Provisions) Act, 1922, for the purpose of providing in Ireland cottages for the accommodation of men who served in any of His Majesty's Naval, Military or Air Forces in the 1914-1918 War. The Trust now owns 1,251 houses in Northern Ireland, and is erecting

(1) [1941] 2 K.B. 89, 101.

36 houses on a site in Belfast. It seems that 26 additional houses will probably be built on the same site but after these have been completed it is not contemplated that any further building will be carried out.

There is at present a waiting list of over 2,000 qualified applicants for tenancies in the houses of the Trust.

The appellant by a written agreement dated the 2nd day of July, 1936, became the tenant of one of these houses, namely 77 Brandon Parade, in the City of Belfast, at the weekly rent of 6*s*. 8*d*., which was inclusive of rates.

On the 25th day of February the Trust sent a letter to each of their tenants informing them that as from the 28th day of March, 1949, the weekly rent would be increased to 10*s*. 11*d*., inclusive of municipal rates, and that it would be necessary to sign a new agreement giving effect to this increase, but that in all other respects the terms and conditions of the existing agreement would remain unaltered. The letter explained that the income from rents had been far below the amount required to maintain the houses, pay the rates and discharge other necessary expenditure and as the Trust was required to make its accounts balance, it had reluctantly been obliged to decide that the rents of all its houses in Northern Ireland should be increased. It is stated that 883 tenants have signed the new agreement. The appellant, however, refused to sign it, contending that he was protected by the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940. He has been paying the increased rent under protest as from the 4th day of April, 1949 ; and on the 28th day of June, 1949, he caused an originating summons to be issued for the determination of the question whether section 4 of the Housing Act (Northern Ireland), 1948, has the effect of depriving tenants of houses of the Trust, whose tenancies were created before the commencement of the said Act, of the protection provided by the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940.

The word " retrospective " appeared in the question, but Lord Justice Black deleted the word, and answered the question in the affirmative.

During the course of the argument before us it was suggested for the first time that the Act of 1940 did not and could not apply to the houses of the Trust, that the provision of houses by the Trust was a reserved matter and that the fixing of the rents by the Trust was entirely outside the jurisdiction of the Northern Ireland Parliament, but as this issue was never raised before Lord Justice Black, it being admitted that the houses of the Trust were controlled by the Act of 1940, I think we should deal with the issue as it was put before Lord Justice Black, omitting all consideration of the effect of the provisions of the Government of Ireland Act, 1920, upon the property of the Trust.

Section 4 of the Housing Act (Northern Ireland), 1948, is as follows :—" The Rent and Mortgage Interest " (Restrictions) Act (Northern Ireland), 1940, shall " not apply to any housing accommodation provided " by the Irish Sailors and Soldiers Land Trust so long " as that accommodation remains in the ownership or " otherwise under the control of the said Trust."

What is the meaning of the words " any housing " accommodation provided " ? In their natural meaning they seem to denote all the houses of the Trust—those which have already been provided and those which may be provided in the future. That this is the meaning of section 4 appears to be borne out by reference to the object of the Housing Act (Northern Ireland), 1948, as set out in the title which is as follows :—

> " An Act to make certain amendments in the law " relating to housing ; to exempt houses of the Irish " Sailors and Soldiers Land Trust from the pro- " visions of the Rent and Mortgage Interest (Restric- " tions) Act (Northern Ireland), 1940 ; and for " purposes connected with the matters aforesaid."

It will be observed that the title refers simply to " houses " without any restriction or qualification, and the section uses the comprehensive words " any housing

" accommodation provided " by the Trust. Mr. Patton for the appellant says that these terms do not apply to any of the 1,251 tenancies existing at the passing of the Act of 1948 but only to such tenancies as may be created in future ; that prior to the passing of that Act the tenants had acquired vested rights which by virtue of section 29 of the 1940 Act were to continue until six months after the end of the period of the present emergency. Section 4 of the 1948 Act, he argues, is not retrospective, and should not be construed so as to destroy any vested right of the tenants. He relies upon sub-section 2 of section 38 of the Interpretation Act, 1889, which is as follows :—

" Where this Act or any Act passed after the " commencement of this Act repeals any other " enactment, then, unless the contrary intention " appears, the repeal shall not . . . (*c*) affect any " right, privilege, obligation, or liability acquired, " accrued, or incurred under any enactment so " repealed."

It is of course, a well-established principle that where rights have already accrued or been acquired, an Act is not to be construed retrospectively so as to divest existing rights unless terms are used which expressly or by clear implication involve such a construction : *Gardner v. Lucas* (1) ; *Smithies v. National Association of Operative Plasterers* (2).

What then is the vested right which the tenants had acquired prior to the passing of the 1948 Act ? Mr. Patton says it is the right to retain possession until the expiration of the 1940 Act so long as they pay the standard rent and the permitted increase.

Now it is admitted that Part II of the 1940 Act applies to the houses of the Trust, but it should be observed that the express purpose of that part of the Act is not to confer rights but to impose certain restrictions on the increase of rent and mortgage interest and on the right to recover possession. It might be suggested that the restriction upon the landlord's rights necessarily implied a corresponding

(1) (1878) 3 App. Cas. 582. (2) [1909] 1 K.B. 310.

increase in the rights of the tenant, but inasmuch as the tenant had no need to invoke the aid of the Act unless and until the landlord sought to recover possession or to exact an unlawful increase of rent. I cannot see how the tenant acquired any specific right under the Act so long as the contractual tenancy continued, and the landlord made no attempt either to exact an unlawful increase of the rent or to recover possession.

When the 1948 Act was passed the contractual tenancy had been in existence since the 2nd day of July, 1936, and there had been no alteration of the terms of the tenancy agreement during that period. No doubt the appellant's house was within the limits of the control of the 1940 Act, but so long as the landlord refrained from any attempt to terminate or alter the terms of tenancy, the 1940 Act did not operate to confer any vested or specific right upon the appellant. Before the passing of the 1948 Act the appellant had what might perhaps be described as an inchoate or a contingent right which would have become a specific or vested right if the respondents had demanded an improper increase of rent or served him with a notice to quit, but unless and until the respondents had done so the appellant had certainly no vested right to avail himself of any of the provisions of the 1940 Act.

A similar question arose in *Abbott v. Minister for Lands* (1). An owner in fee simple of lands in New South Wales had made several conditional purchases of crown lands in 1873 under section 22 of the Crown Lands Alienation Act of 1861. That Act and the Acts amending it were repealed by the Crown Lands Act of 1884, but section 2 contained a proviso that notwithstanding such repeal all rights accrued under or by virtue of any of the repealed enactments should remain unaffected by such repeal. In 1892 the owner tendered an application for an additional conditional purchase of 150 acres adjoining his holding and lodged the prescribed deposit of 2*s*. 0*d*. per acre, but his application was refused. The first contention made

(1) [1895] A.C. 425.

by his counsel was that he was the holder of a conditional purchase within the meaning of section 42 of the 1884 Act under which it was alleged he was entitled to make the additional conditional purchase. Their Lordships held against this contention. It was further contended that the saving proviso of section 2 of the 1884 Act enabled him to make an additional conditional purchase as if section 22 of the 1861 Act remained in force, because under that section he had a right to make the additional conditional purchase, and that this was a " right accrued " at the time the Act of 1884 was passed, and that notwithstanding the repeal it remained unaffected by such repeal.

Herschell L.C. delivering the opinion of the Judicial Committee of the Privy Council said (1) : " It " has been very common in the case of repealing " statutes to save all rights accrued. If it were held " that the effect of this was to leave it open to any one " who could have taken advantage of any of the " repealed enactments still to take advantage of them, " the result would be very far-reaching. It may be, " as Windeyer J." (one of the Judges of the Supreme Court of New South Wales) " observes, that the power " to take advantage of an enactment may without " impropriety be termed a ' right.' But the question " is whether it is a ' right accrued ' within the meaning " of the enactment which has to be construed. Their " Lordships think not, and they are confirmed in this " opinion by the fact that the words relied on are " found in conjunction with the words ' obligations " ' incurred or imposed.' They think that the mere " right (assuming it to be properly so called) existing " in members of the community or any class of them to " take advantage of an enactment, without any act " done by an individual towards availing himself of " that right, cannot properly be deemed a ' right " ' accrued ' within the meaning of the enactment."

In *Hamilton Gell v. White* (2) Atkin L.J. (as he then was) quoted the last sentence on the meaning of the words " right accrued " in section 38. That was a

(1) Ibid. at 431. (2) [1922] 2 K.B. 422, 432.

case in which the landlord of an agricultural holding had given the tenant notice to quit as he was desirous of selling the holding. The tenant duly gave notice of his intention to claim compensation under section 11 of the Agricultural Holdings Act, 1908. Under that section he was to make his claim within three months after quitting the holding, but before the tenancy expired section 11 was repealed by the Agriculture Act, 1920. Subsequently he made his claim within the three months limited by the section. It was held by the Court of Appeal that the tenant had "acquired "a right" which would "accrue" when he quitted the holding, to receive compensation.

Discussing the effect of section 38 of the Interpretation Act, 1889, Atkin L.J. said (1): "It is obvious "that that provision was not intended to preserve the "abstract rights conferred by the repealed Act, such "for instance as the right of compensation for dis-"turbance conferred upon tenants generally under "the Act of 1908, for if it were the repealing Act "would be altogether inoperative. It only applies to "the specific rights given to an individual upon the "happening of one or other of the events specified in the "statue. Here the necessary event has happened, "because the landlord has, in view of a sale of the "property, given the tenant notice to quit. Under "those circumstances the tenant has "acquired a "right," which would 'accrue' when he has quitted "the holding, to receive compensation." This passage was quoted with approval by Lord Wright M.R. in *In re a Debtor* (2).

In the present case even on the assumption that the Act of 1940 conferred rights upon the tenants prior to the passing of the 1948 Act, those rights cannot be described as *acquired* or *accrued* or *vested*. They are nothing more than a mere right (as Lord Herschell described it) in a class of tenants to take advantage of the enactment. They are only abstract rights (in the words of Atkin L.J.) conferred upon the tenants generally. The event which might have transformed

(1) Ibid. 431. (2) [1936] 1 Ch. 237, 242.

them into specific rights never occurred, because the landlords never served notice to quit or demanded an increase of rent.

It is unnecessary to discuss any other aspect of this case as I am clearly of opinion that the appellant had no vested or specific right under the Act of 1940 at the time of the passing of the 1948 Act ; and that by virtue of section 4 of the latter Act the appellant and all those tenants of the respondents whose tenancies were created before the commencement of the 1948 Act are not entitled to the protection of the 1940 Act.

I think Lord Justice Black was right in answering the question in the affirmative.

SHEIL J. : I have had the advantage of reading the judgment of my Lord, the Lord Chief Justice. I respectfully agree with his interpretation of the section under review. It is as wide as possible ; it says, "*any* "housing accommodation" without restriction, and it says "any housing accommodation *provided* by the Irish Sailors and Soldiers Land Trust." I cannot read the word "provided" other than as adjectival or descriptive of the housing accommodation.

We cannot ascribe to Parliament ignorance of the parlous financial condition of the Trust as described in Mr. Brownell's affidavit—a condition which began before 1948, yet the Trust was and is required to balance its accounts. If the contention of the appellants were to succeed and the section to have a prospective construction, and be held to apply only in the cases of houses not built at the date of the passing of the Act, or houses let to new tenants after that date, it would follow that the rents of such houses would be required to bear a proportion of the outgoings of houses such as the houses occupied by the appellant, in other words to indemnify the appellant and those similarly circumstanced, though all the tenants had precisely similar claims to houses. If then we look "to the general "scope and purview of the section," to "the purport "and object of the Legislature, as manifested in that "section" we must construe the section as affecting

each and every house at any time provided by the Trust.

While I do not doubt the construction to be put on the section reading it by itself, I respectfully agree with my Lord's observations on the long title of the Act, and the assistance to be derived therefrom.

I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant : *Wm. Alexander & Sons.*

Solicitor for the respondents : *F. C. McNeice.*

J. P.

REX v. ROBERT TAYLOR (1).

Criminal law—Procedure—Trial for felony—Murder—Jury—Separation before summing up—Irregularity—Effect on verdict—Miscarriage of justice—Conviction quashed—Whether venire de novo *can be ordered—Criminal Justice Act (Northern Ireland),* 1945 (9 & 10 *Geo.* 6, *c.* 15), *s.* 39.

A jury empanelled in a lengthy trial for murder was lodged each evening in the courthouse. On the third day of the trial the jury sought and obtained the permission of the trial judge to go for an evening drive in a private omnibus for the purpose of fresh air and exercise. The permission was given on condition that the jurors should be in charge of four constables sworn as jury keepers, two of whom were to precede and the other two to follow the jurors during their exercise. In the course of the drive the omnibus stopped at a seaside town where the jurors split into three groups, one of which went into a private room in an hotel for drinks, and each of the other two went for a walk in the course of which they entered a café for refreshments. Each group was accompanied by at least one jury keeper, and the evidence of the jury keepers was that none of the jurors conversed with any member of the public except for the purpose of ordering refreshment.

On the following evening, without any further permission from the trial judge, nine of the jurors accompanied by three jury keepers went for a drive in a private omnibus to a neighbouring town. The remaining jurors stayed in the courthouse with the other jury keeper. The nine jurors, on arriving at their destination, split into three groups each accompanied by a jury keeper. One group went into a private room in an hotel for drinks. A second group of three jurors went into a shop where one juror spoke to the shopkeeper who was an acquaintance while the other jurors engaged in general conversation with customers in the shop. The jury keeper in charge of this group deposed that no reference to the trial was made by any person. After leaving the shop this second group went for a walk and then returned to the lounge bar of an hotel where members of the public were present, but the jurors spoke to no one except when ordering drinks. The third group went for a walk and then entered a cafe where they had coffee : though members of the public were present in the cafe the jurors spoke to no one except when ordering coffee.

On the return journey on this second evening the driver of the omnibus, at the request of the foreman, made a detour in order to

(1) In the Court of Criminal Appeal before Porter and Black L.JJ. ; December 19, 20, 21, 22, 1949 ; January 20, 1950.

pass a road junction near the scene of the crime which had been referred to in the course of the trial.

None of these facts was known to the trial judge or counsel until after conviction and sentence.

Held, (i) that the foregoing facts showed such irregularities in the established procedure relating to the separation of juries as to vitiate the verdict.

(ii) that a substantial deviation from the established rules of procedure is itself a miscarriage of justice, and it was irrelevant to consider whether the accused had in fact been prejudiced by these irregularities.

(iii) that as the trial was not such a mistrial as to be a nullity from the outset there was no power in the Court of Criminal Appeal to order a *venire de novo*, and that accordingly the conviction must be quashed.

The common law rules relating to the separation of juries in cases of felony in the period before the summing up, though less strict than those which apply after summing up, require the segregation of the jurors from the general public, with whom they may not have any communication except in case of necessity or emergency. A judge may, however, in his discretion allow a jury to have an outing for fresh air and exercise, but in such a case they must be kept together as a body.

APPEAL against conviction.

The appellant was arraigned before Andrews L.C.J. at the Belfast City Commission on an indictment charging him with murder, and was convicted and sentenced to death. He appealed to the Court of Criminal Appeal against conviction on the ground, *inter alia*, that the jury separated during the course of the trial, and the case is reported only on this issue.

The facts sufficiently appear in the headnote and in the judgment of the Court of Criminal Appeal.

Hanna K.C. and *Fox* for the appellant. At first jurors were virtually imprisoned and were denied food and drink: see Holdsworth, History of English Law, vol. i, pp. 318-9, and *Lord Delamere's case* (1). It is conceded that the rules were later modified—see *R. v. Hardy* (2) and *R. v. Horne Tooke* (3)—and that it

(1) (1686) 11 State Tr., col. 510, 559-61.
(2) (1794) 24 State Tr., col. 199, 414.
(3) (1795) 25 State Tr. col. 1, 129, 30.

became permissible to allow separation up to the summing up in trials for misdemeanour, but after summing up and at all times in trials for felony no separation was permissible. In *R. v. O'Neill & Henderson* (1), Brady C.B. held that a separation of a juror from the rest was not a ground for quashing the verdict, purporting to follow *R. v. Fowler & Sexton* (2), but the English Court of Criminal Appeal has expressed disapproval of the decision: *R. v. Ketteridge* (3).

In England a statutory amendment was made by the Juries Detention Act, 1897, which is almost identical with s. 39 of the Criminal Justice Act. Northern Ireland), 1945. The effect of these provisions is to give the court power to permit separation in cases of felony in the same way as in cases of misdemeanour, but treason, treason felony and murder are expressly excluded. These statutory changes show that there was no power to permit separation apart from them, and the exclusion of certain crimes is to be taken as denying the power to allow separation in those cases. A further alteration has been made in England by s. 35 (4) of the Criminal Justice Act, 1948, which abolishes this distinction, but no such provision applies here.

Two important decisions since the Act of 1897 in England are *R. v. Ketteridge* (3) and *R. v. Crippen* (4); in the latter case where a juror was taken ill and attended by an unsworn bailiff it was held that the verdict need not be quashed, but that was a case of emergency which has long been recognised as a reason for relaxing the strict rule. Since the 1948 Act the English Court of Criminal Appeal has decided in *R. v. Neal* (5) that where a judge allowed the jury to separate after he had summed up the verdict must be quashed, and a *venire de novo* cannot be awarded in such a case. The same principle must be applied in this case, because by our law there is no power to allow separation at any time in a case of murder.

(1) (1841) Ir. Cir. Cas. 371.
(2) (1821) 4 B. & Ald. 273.
(3) [1915] 1 K.B. 467.
(4) [1911] 1 K.B. 149.
(5) [1949] 2 K.B. 590.

Separation has not been precisely defined but it should be taken in its ordinary sense. No judge would have sanctioned the events which occurred in this case, and the trial judge would have discharged the jury if he had known what had taken place, even at that late stage in the trial. To condone these irregularities would bring the law into contempt, and it would place too much reliance on jury keepers. Similarly no judge would have allowed some of the jurors to view a locus : he would have sent all or none, and would have ensured that they had a proper opportunity to view. Viewing by jurors is provided for by s. 11 of the Juries Procedure (Ireland) Act, 1876, and it is a matter for the court's discretion, so that in this case the prisoner was deprived of protection to which he was entitled.

It is not only from the prisoner's point of view that the matter should be regarded, for it is in the interest of all that the administration of justice should be as perfect as possible : *R. v. Bertrand* (1). It is of even greater importance when the death penalty is involved : *Lord Delamere's case* (2). Even in civil cases separation of juries should only be allowed in special circumstances : see the judgment of Lord Reading C. J. in *Fanshaw v. Knowles* (3).

Warnock A.-G., *McCoy K.C.* and *McCall* for the Crown. It is assumed that the trial judge had power to allow the jury to have an outing, and that in an omnibus if they so desired, notwithstanding that they are to be kept in a " private and convenient place." There are three cardinal rules governing the conduct of a jury on a capital charge : (i) that they must not disperse until they are discharged ; (ii) that they must not discuss the case with anyone but themselves ; (iii) that they must have absolute privacy in their deliberation, that is, after the judge has summed up. It is only if one of these rules is broken that it is necessary to quash a conviction. The jury keeper's

(1) (1867) L.R. 1 P.C. 520.
(2) (1686) 11 State Tr. col. 510, 559-61.
(3) [1916] 2 K.B. 538, 547.

oath, which has been substantially the same for 150 years, shows that it was never essential, even if desirable, to forbid all communication between jurors and the public. This proposition is further illustrated by s. 11 of the Juries Procedure (Ireland) Act, 1876, already cited, for it refers only to the prevention of "undue communication." The proper approach to this case is to accept the verdict as good until there is some ground for setting it aside: *R. v. Kinnear* (1). Even if the jurors or bailiffs fall short of what is required of them and become liable to penalties, the verdict may stand.

There has been a progressive modification of the common law rules in relation to juries until in England at present the strict rules apply only in the period after the judge's summing up. The distinction between the period before and the period after summing up was recognised, even in felonies, before the statutory amendments, though it is nowhere expressly stated. The rules applying in the former period are more in the nature of rules of practice—*Winsor v. Reg.* (2)—and are subject to change.

[Black L.J.: Are they not stereotyped now, apart from statute?]

More than formerly, but not entirely.

Separation in relation to juries obviously cannot mean physical departure from each other's presence. This is recognised in *R. v. Crippen* (3). The important facts in the reported decisions is whether or not the jurors remained under the control of the court. This is shown by the form of the notice of appeal in *Crippen's case* (3), and in *R. v. Ketteridge* (4). A further illustration is *R. v. Neal* (5) where, again, the jurors were outside the control of the court. In that case the separation was during the period when by all the authorities it was not permissible.

Without necessarily approving of the events which occurred, it is submitted that there is no ground for

(1) (1819) 2 B. & Ald. 462.
(2) (1866) L.R. 1 Q.B. 289, 303.
(3) [1911] 1 K.B. 149.
(4) [1915] 1 K.B. 467.
(5) [1949] 2 K.B. 590.

setting aside the verdict. Although it is clear that the jurors conversed with members of the public, it is agreed that no one spoke to them about the trial.

[Porter L.J. : Does it not seem from *R. v. Ketteridge* (1) that the possibility of interference is enough ?]

In that case the irregularity occurred after summing up, and there was no evidence as to what had occurred.

As to the viewing by one of the jurors, it is a trivial matter which could not avoid the verdict. Even if a detour had not been made the omnibus would have have passed another part of the locus.

If the conviction is quashed it is conceded that a *venire de novo* cannot be awarded. But it is submitted that there has been no miscarriage of justice within the meaning of the Criminal Appeal Act to justify the quashing of the conviction. There was overwhelming evidence to support the verdict.

Hanna K.C. replied.

Cur. adv. vult.

The judgment of the court was delivered by PORTER L.J. After rejecting the submission made on behalf of the appellant that the trial judge wrongly admitted evidence of a dying declaration his Lordship continued:—

The other ground of appeal upon which the appellant relies is that the jury separated during the course of the trial.

An application had been made to the court on behalf of the appellant for leave to call a number of witnesses to establish that the jury had separated on two evenings during the course of the trial. This application was grounded on affidavits to which we need not refer inasmuch as at the hearing of the appeal it was agreed that the facts and circumstances of the alleged separation of the jury, as set forth in affidavits filed on behalf of the Crown, should be taken as admitted. These affidavits were made by the Under-Sheriff of the City, the Clerk of the Crown and Peace, the Deputy Clerk of the Crown and Peace, a Head Constable of the Royal Ulster Constabulary, and a sergeant and four constables

(1) [1915] 1 K.B. 467.

of the same Force who had been sworn as jury keepers for those two evenings. We have also the report of the Lord Chief Justice furnished in pursuance of the provisions of section 8 of the Criminal Appeal (Northern Ireland) Act, 1930.

We, of course, entirely accept the assurance of Mr. Hanna that neither he nor his colleague, nor the solicitor instructing them, was aware of the alleged separation of the jury until some time after the conclusion of the trial, and that none of them was aware of the actual facts relating to the separation until they had seen the affidavits filed on behalf of the Crown.

It may be convenient to set out in the first place the relevant portions of the Lord Chief Justice's report He says: "As regards the alleged separation of the "jury, I can give little assistance beyond stating that "the allegation of any supposed irregularity on the "part of the jury came as a surprise to me. No such "suggestion was made at the trial. If I am rightly "informed that the separation is alleged to have "occurred after the rising of the court on the "Wednesday and Thursday of the trial, or on one "of these days, I have only to say that the Under "Sheriff approached me on the Wednesday morning "before the sitting of the court, with a request from "the jury that they might be allowed to go to Bangor "that evening in a private bus for fresh air and "exercise as they were feeling the effects of the "prolonged court sittings. Being informed by the "Under Sheriff that a similar privilege had been "granted to the jury at the trial in July (1) assented to "the request on the express instructions that the jury "should be accompanied by at least four sworn "members of the Royal Ulster Constabulary (one of "whom should be of at least sergeant rank) so that as I "expressly stated the body of jurors should be both "immediately preceded and immediately followed on "their walk by two policemen to prevent any possi-

(1) [The appellant had been arraigned on this charge at the City Commission in the previous July when the jury failed to agree. —EDITOR].

" bility of irregularity. The four policemen who were " to have charge of the jury until the following morning " were sworn in court before the court arose ; but, of " course, no reference was made in court to the " proposed visit to Bangor."

" On enquiry from the Under Sheriff before the " sitting of the court on the Thursday morning I was " informed that the journey had been a complete " success, and that the jury had much appreciated " the consideration which I had shown them."

" No permission was sought from or granted by me " in regard to any bus journey on the Thursday " evening ; nor was any report subsequently made to " me in regard to such journey, if in fact it took place."

" Further than as above stated, I can say nothing, " except that I was of opinion from what I saw of " them in court that the jury was a superior one ; " and even if any irregularity did take place, I cannot " believe that any of them would have discussed the " case with any other than members of their own " body. I have no doubt that they were fully alive " to their duty in this respect, being placed in charge " of sworn constables on every occasion upon which " the court rose throughout the trial."

It will next be convenient to summarize from the affidavits of the sergeant and constables who were in charge of the jury what in fact took place.

On Wednesday evening, the 26th October, the members of the jury accompanied by the sergeant and three constables (all in plain clothes) left the courthouse about 7-15 p.m. in a private bus. Before entering the bus the foreman of the jury told the bus driver that the run was to Donaghadee. The route taken was through Bangor and there was no stop until the bus reached the quay at Donaghadee. This would presumably be about 8 o'clock. When the jurymen and the police officers got out of the bus at Donaghadee they divided into three parties. One party, consisting of six jurymen, accompanied by the sergeant, made their way to a public house on the suggestion of the foreman, and procured a room. When they entered there were two men in this room, but when the jurymen

and the sergeant got seated these men left and were not spoken to by any of the party. After about three rounds of drinks, some being minerals, these jurymen and the sergeant returned to the bus arriving there about 9 p.m. Another party, consisting of three jurymen and a constable, went for a walk along the sea front and then went into a café and had cups of coffee and some food. When they entered the café the attendant was the only other person present. While they were having their coffee a man came in and passed some remarks about the weather, to which one of the jurors replied. Later two girls came in but had no conversation with the members of the jury. After spending about ten or fifteen minutes in the café this party returned to the bus. The remaining three jurors, accompanied by the other two constables, went for a walk along the quay towards the lighthouse. After about ten minutes walk they returned to the bus. Later these three jurors decided to have a cup of tea and accompanied by the two constables and the bus driver they went to a café on the seafront. The only person in the café was the man behind the counter. While they were in the café no mention was made of the Taylor case by any member of the jury and no person spoke to them except the man who took the order for the tea. After spending about ten or fifteen minutes in the café they returned to the bus, finding the other two parties already in it. The bus then returned to Belfast via Newtownards, arriving at the courthouse about 10 p.m.

On the next evening, Thursday, the 27th October, a private bus was again made available to take the jury for a run. On this occasion three members of the jury preferred to remain in the courthouse and one of the constables was left in charge of them. The bus with the other nine members of the jury accompanied by the sergeant and the other two constables, left the courthouse about 7 p.m. The foreman having told the bus driver where to go the party travelled to Antrim via Nutt's Corner. They would presumably arrive in Antrim about a quarter to eight o'clock. On arrival in Antrim they again split up into three

parties. The foreman and three other members of the jury with the sergeant went into a licensed hotel in that town, and at the sergeant's request, went to a private room. A gentleman and two ladies were in this room but left shortly after the arrival of the members of the jury and no one spoke to them. After a few drinks the jurors and the sergeant left the premises and entered the bus, finding that all their colleagues had already returned to it. They arrived back at the courthouse about 10 o'clock. We may assume that the bus must have left Antrim about 9-15 p.m.

Of the other jurors who went to Antrim a party of three, accompanied by one of the constables, went for a walk up the main street. One of the party wanted to buy some pears so they all went into a fruit shop. There were three women and one man in the shop. The woman in charge of the shop recognized one of the jurors whom she had not seen for fifteen years or so, and they had a general conversation about their friends. The other two women and the man were in conversation with the other two jurors. According to the constable this conversation was mostly about tea, as the stranger was employed by a tea firm. The constable says that he heard both conversations and that there was nothing said which had any bearing on the Taylor case. After leaving the shop these three jurors and the constable went for a short walk towards the railway station, and then found their way into the same hotel to which their colleagues had betaken themselves. They did not join their colleagues, however, but contented themselves with remaining in the lounge bar, where they had a round of drinks, and after about twenty minutes they returned to the bus. There were four other people present in the lounge bar, but the constable deposes that there was no conversation between the jurors and any other person except when the drinks were being ordered, and that the Taylor case was not discussed.

The other two members of the jury and the remaining constable, after their arrival in Antrim,walked up the

main street of the town to near the top of it, turned and came back down the street and went into a café beside the hotel which their colleagues had gone into. In the café there was one woman customer and two girls behind the counter. The jurors and the constable sat down at the counter and had coffee. They remained in the premises about ten minutes and then returned to the bus. During the time they were in the café they had no discussion with any person except in ordering the coffee.

On the return journey from Antrim to Belfast the bus instead of continuing straight down the Antrim Road the bus made a slight detour when it came near the scene of the crime with which Taylor was charged. On the instructions of the foreman the driver turned down the Limestone Road, then along Atlantic Avenue, passing the end of Baltic Avenue on the right and of Newington Avenue and Ponsonby Avenue on the left, and rejoined the Antrim Road at the top of Duncairn Gardens. We shall have to deal with this incident later in our judgment.

As regards the legal position the ancient rule was that jurors were not allowed to separate until they had given their verdict. As was said in an old case in the reign of Henry VII: "When a jury is "charged they are as it were prisoners until they were "discharged." In Coke upon Littleton 227b, it is stated that: "By the law of England a jury, after "their evidence given upon the issue, ought to be kept "together in some convenient place, without meat or "drinke, fire or candle, which some books call an "imprisonment, and without speech with any, unlesse "it be the bailiff, and with him onely if they be "agreed." The rigidity of this rule was early relaxed in civil cases, and in 1819 Abbot C.J. was able to say that many instances had then occurred in which dispersion of the jury had been permitted on trials for misdemeanours and that every such instance proved that this might be lawfully allowed (*R. v. Kinnear*) (1).

(1) (1819) 2 B. & Ald. 462, 464.

In cases of felony, however, the old rule continued. The jury were not permitted to separate from the time of being sworn on the trial until they delivered their verdict, unless in some very special and exceptional circumstances as, for example, in a sudden emergency or a case of urgent necessity and even then only with the permission and under the strict control of the court. The rule at first appears to have been that once a trial had been entered upon it had to continue without any adjournment until the verdict was delivered. But in the lengthy trials for treason towards the end of the eighteenth century it became a physical impossibility to continue without adjournments, and accordingly the practice grew up of providing accommodation for the jury overnight, either in the courthouse itself or in some convenient place in the neighbourhood. But the jury were kept apart under the charge of officers appointed for the purpose, whose duty it was not to allow them to separate or to hold communication with the outside public. The matter will be found discussed at length by Eyre C.J. in *R. v. Hardy* (1) and in *R. v. Horne Tooke* (2). So the practice continued in England until near the end of the nineteenth century, and in Northern Ireland until less than five years ago. If a trial for treason or felony did not conclude in one day the jury, to use the common phrase, were "locked up" for the night. In this respect there was no difference between the practice in capital felonies and in other felonies. In *Damery's case* (3) the prisoner was tried for manslaughter at the Cork Summer Assizes. The trial lasted the whole day and there being no likelihood of its termination till a very late hour, Ball J. adjourned it till the next day, and the case not being capital was at first inclined to allow the jury to separate, but afterwards upon the authority of the English case of *R. v. Caspar* (4), directed the jury to be kept together at an hotel under the charge of the Sheriff. In practice, of course, it

(1) (1794) 24 State Tr. col. 199, 414.
(2) (1795) 25 State Tr. col. 1, 129-30.
(3) (1841) Ir. Cir. Cas. 371.
(4) (1839) 9 Car. & P. 289, on a different point.

has rarely been found necessary in our jurisdiction in recent years to lock up juries overnight except in capital cases. It has almost always been possible to conclude the trial of other felonies in a single day. It will be in the recollection of the profession, however, that a few years ago the jury had to be locked up upon the trial in Belfast of a difficult and lengthy manslaughter case.

The first inroad on this rule that juries were not permitted to separate in cases of felony was made in England in 1897. It was enacted by section 1 of the Juries Detention Act, 1897, that: "Upon the trial of "any person for a felony other than murder, treason, "or treason felony, the court may, if it see fit, at any "time before the jury consider their verdict, permit "the jury to separate in the same way as the jury upon "the trial of any person for misdemeanour are now "permitted to separate." This Act did not apply to Scotland or Ireland, and in Northern Ireland the position remained as it had been in England prior to 1897 until the coming into operation on the 1st January, 1946, of the Criminal Justice Act (Northern Ireland), 1945. In England a further step was taken under the exigencies of the recent war. By regulation 15A of the Defence (Administration of Justice) Regulations, 1940 (S. R. & O. 1940 No. 1869) the court was enabled, if it thought fit, upon the trial of any person for murder, treason or treason felony, to permit the jury to separate at any time before they considered their verdict. And now by section 35 (4) of the English Criminal Justice Act, 1948, it is enacted in general terms that: "Upon the trial of any person for an "offence on indictment the court may, if it thinks fit, "at any time before the jury consider their verdict, "permit them to separate."

Regulation 15A of the Defence (Administration of Justice) Regulations, 1940, did not apply to Northern Ireland, nor of course does the Criminal Justice Act, 1948. The matter was, however, dealt with in Northern Ireland by section 39 of the Criminal Justice Act (Northern Ireland), 1945. Except for one slight verbal alteration this section follows word for word

the terms of section 1 of the English Act of 1897. So that, notwithstanding the five years experience which the English courts had had of the operation of regulation 15A of the Regulations of 1940, the Northern Ireland Legislature in 1945 excluded murder, treason, and treason felony from the cases in which the court was to be at liberty to permit the jury to separate. And no further alteration has since been made in the law here.

It will be noticed that these statutory relaxations of the old rule which forbade the separation of jurors extend in their express terms only to the period before the jury consider their verdict. After the judge has charged the jury and they proceed to consider their verdict the strict rule still remains in all criminal cases, whether felonies or misdemeanours, that they must deliberate together and in private without separating. If one of the jurors separates himself from his colleagues after the judge has summed up in a criminal case and not being under the control of the court converses with, or is in a position to converse with, other persons, it is clearly established that such an irregularity is a sufficient ground for setting aside the verdict, and in such a case the court will not investigate whether during the course of the separation there were in fact any contacts with the juror which might prejudice the trial: *R. v. Ketteridge* (1); *R. v. Neal* (2). Quite apart from any question of separation there must be no communication between outsiders and the jury once they have retired to deliberate: *R. v. Willmont* (3). As Shearman J. observes in *Goby v. Wetherill* (4): "It is a cardinal principle of the jury "system that a jury must deliberate in private." In that case—a civil case—a Divisional Court set aside the verdict of a jury and directed a new trial on the mere ground that the official who acted as the usher of the court, and to whose care the jury had been committed, remained with the jury in the jury room for about twenty minutes during their deliberations,

(1) [1915] 1 K.B. 467.
(2) [1949] 2 K.B. 590.
(3) (1914) 10 Cr.App.R.173.
(4) [1915] 2 K.B. 674, 675.

though it appeared that neither by word nor deed did he interfere in any way.

With regard to the period before the judge's summing up, the very wording of section 1 of the Act of 1897 and section 39 of the Act of 1945, shows that the Legislatures assumed the rule of law prior to the passing of those Acts to be that in cases of felony there could be no separation of the jury even before the judge's charge. And, indeed, there can be no doubt that this was the universally recognized rule, as is shown not merely by what was said and done in the old cases such as *R. v. Hardy* (1) and *R. v. Horne Tooke* (2), but by the invariable practice which has continued down to our own time of locking up the jury for the night in cases which did not conclude on the day on which they were commenced.

This rule that there should be no separation in the course of the trial does not, however, mean that the jurors should be kept together all the time in one room. If locked up within the precincts of a courthouse they would normally have different rooms for eating and sleeping and some members of the jury might choose to retire for the night long before the others. If accommodation were provided for them in an hotel they would probably have separate bedrooms. The object of the rule is that there should be no opportunities of tampering with or influencing the jury during the course of the trial, and the rule must be construed as having this as its object. It is obvious that it would be impracticable to prevent all communication with outsiders. Members of the jury, for example, would have to make their wants known to waiters and other attendants. Moreover, emergencies might well arise when it would be essential that some contact with outsiders should be allowed. A juror might fall ill and need the attention of a doctor, as happened in *R. v. Crippen* (3). Or it might be necessary that a juror should receive and perhaps reply to some communication of urgent business or domestic importance. In such cases the judge would be fully entitled to permit

(1) (1794) 24 State Tr., col. 199.
(2) (1795) 25 State Tr., col. 1.
(3) [1911] 1 K.B. 149.

communication with a juror under proper safeguards. That the position of a jury locked up during the course of a trial before the judge has summed up is not identical with the position after they have been charged and are proceeding to consider their verdict, has been recognized from the earliest instances which we have of trials for felony being adjourned overnight. The difference is shown by the distinction between the usual form of oath administered to a bailiff or jury keeper when the jury retire to consider their verdict, and the form used upon an adjournment in the course of the trial. In the former case the jury keeper should be sworn that he will keep the jury in some private and convenient place with such accommodation as the court shall direct, and that he will not suffer anyone to speak to them nor will he speak to them himself, unless it be to ask them whether they have agreed on their verdict, without leave of the court. Whereas, when the jury is locked up in the course of the trial the form of oath ordinarily administered (which has come down from *R. v. Stone* (1)), is that he will keep the jury in some private and convenient place with suitable and proper accommodation, and that he will not suffer anyone to speak to them or any of them, neither will he speak to them himself touching upon or concerning the trial without leave of the court (see Stringer on Oaths, 4th ed. p. 190). After the jury has been charged by the judge the jury keeper is not to allow anyone to speak to the jurors at all. But during the course of the trial he is not to allow anyone to speak to them touching upon or concerning the trial.

It was accordingly submitted to us on behalf of the Crown that there is no rule of law that members of a locked up jury may not hold communication with outsiders during an adjournment in the course of the trial, provided that the jury keepers see to it that any such communications do not relate to the subject matter of the case. That, in our opinion, is not a true statement of the position. If the submission was accepted it would mean that members of a locked up jury could freely receive visitors from outside, provided

(1) (1796) 6 T.R. 527.

that the visits were in the presence of a jury keeper, and that no reference was made to the trial. This is quite contrary to what has always been understood to be the established practice. Locked-up juries have never been allowed free communication with the outside world on topics other than the subject matter of the trial. Their communication with persons other than their own members has always been restricted to matters of reasonable necessity and matters of emergency, and that too under the control of the court and the custody of the keepers. The reason for the practice is clear. The jury are to be kept apart primarily in order that they may not be approached about the trial; but their separation during the trial from the community outside serves to impress them with a sense of the solemn responsibility with which they are charged, and also to render them less liable to be affected by the rumours and prejudices which are apt to spread especially on the occasion of a trial for some outrageous or sensational crime.

Strangely enough there is little authority to be found in the reports with regard to the keeping of a jury during adjournments prior to a judge's charge. In the old Irish case of *R. v. O'Neill and Henderson* (1), a juror in a case of larceny succeeded in separating himself from his fellows and found his way out into the city during an adjournment in the course of the trial. He was discovered and brought back, and the jury found one of the prisoners guilty. The court refused a motion in arrest of judgment. We doubt, however, if this case can be regarded as an authority of any weight. It was not a decision of an appellate court; the felony was of a comparatively minor nature; and the case does not appear to have found favour with the English Court of Criminal Appeal in the modern case of *R. v. Ketteridge* (2).

In *R. v. Murphy* (3), after a conviction for murder the Supreme Court of New South Wales had granted a *venire de novo* for the retrial of the accused on the ground that the jury, while locked up during the trial,

(1) (1843) 3 Cr. & Dix. 146.
(2) [1915] 1 K.B. 467.
(3) (1869) L.R. 2 P.C. 535.

had access to newspapers containing reports of the trial so far as it had gone. The court, in strong judgments, held that the effect of this was to create an extreme risk of a substantial miscarriage of justice. The Judicial Committee, however, reversed the decision of the Supreme Court on the ground that a *venire de novo* could be granted only if the verdict was a nullity, and that there was no authority for holding a verdict in a case of felony to be a nullity merely by reason of some conduct on the part of the jury which the court considered unsatisfactory. While this ground was sufficient to dispose of the appeal the Board in their opinion indicated that they thought the evidence before the Supreme Court (which was purely hearsay) to have been too scanty and unsatisfactory to justify them in acting upon it. They also seemed to have some doubt whether the facts alleged were sufficiently strong to warrant the Supreme Court's view. Nevertheless, they conclude their judgment by saying: "If irregularity "occurs in the conduct of a trial not constituting a "ground for treating the verdict as a nullity, the "remedy to prevent a failure of justice is by application "to the authority with whom rests the discretion "either of executing the law of commuting the sentence. "As there was, in the opinion of the Court below, "irregularity in the trial of the Respondent sufficient to "vacate the judgment, their Lordships have no doubt "that, upon proper application on behalf of the "Respondent, which they recommend to be made, such "weight will be given to these remarks as they may "appear to deserve." In England and in Northern Ireland since the passing of the Criminal Appeal Acts, the remedy in the case of an irregularity in the conduct of a trial is to be sought by way of an appeal to the Court of Criminal Appeal. Mr. Hanna naturally argues that the fact that the Judicial Committee in *R. v. Murphy* (1) recommended that an application be made to the authority with whom rested the discretion either of executing the law or commuting the sentence, indicates that in the Board's view the irregularity complained of was such as might justifiably have been

(1) (1869) L.R. 2 P.C. 535.

made a ground of appeal if there had been in New South Wales at that time a court invested with the powers of our Court of Criminal Appeal.

The only other reported case to which we were referred in which the position during the stages of a trial prior to the judge's summing up was considered is *R. v. Crippen* (1). In that case—a murder trial—a juror was suddenly taken ill during the trial; he had to leave the jury box and was attended by doctors within the precincts of the court. The Court of Criminal Appeal held that this separation—such as it was—did not vitiate the trial. It was a case of emergency and the circumstances of the separation were such that no prejudice could possibly have been caused to the prisoner.

As will be seen, these authorities give no great assistance in the present case. The law, however, undoubtedly is that when a jury is locked up it is the duty of the jury keepers to keep the jury in some private and convenient place. This has always been interpreted as meaning that the jurors must be kept segregated from the public. Ordinarily they will be kept in a suite of rooms to which no one else has access except the necessary attendants. It is, however, clearly within the discretion of the court to allow them to be taken out to the country or the seaside for fresh air and exercise. But before this is done the permission of the court—that is of the judge himself—must in our opinion be obtained. Neither the sheriff nor the jury keepers are entitled, on their own initiative and without the permission of the court to take out the jury, or to permit them to be taken out, on such an outing. Moreover, when the jury are taken out they should, so far as reasonably possible, be kept together as a body; they should not be allowed to separate into parties and lose touch with one another. And of course they must clearly keep within the limits prescribed by the court.

In the present case the instructions given by the Lord Chief Justice were strict and definite. By some unfortunate mischance—arising we know not how—

(1) [1911] 1 K.B. 149.

his directions do not appear to have been conveyed either to the jury or to the jury-keepers. What was in fact done was clearly outside the authority which he gave. The only permission given by him was that they should be taken down to Bangor. They did not stop at Bangor but went on to Donaghadee. This would not, perhaps, have been a serious matter if at Donaghadee they had gone for a walk accompanied by the police officers, as the Lord Chief Justice had directed. But they were obviously not aware that the permission which he had given was merely to have an opportunity of taking fresh air and exercise together. He clearly did not authorise, and never would have authorised, that they should separate into different parties, and that half of them should spend the greater part of their stay at Donaghadee in a public house, and that the others, after taking their walk, should go into public cafés. If what had happened on the Wednesday evening had become known the next morning, it might very well have been made the ground of an application to discharge the jury. As regards the visit to Antrim on the evening of the 27th October, this was never authorised by the Lord Chief Justice at all. We do not know how, or why, it was assumed that the permission to leave the Courthouse on Wednesday evening for a run to Bangor included permission for an outing on Thursday evening also to wherever the jury chose to go.

During the argument emphasis was laid on a phrase used in the judgment of the Court of Appeal in *R. v. Ketteridge* (1). It was there said that if a juror, after the judge had summed up in any criminal trial, separates himself from his colleagues, and not being under the control of the court converses or is in a position to converse with other persons, it is an irregularity which in the opinion of the court renders the whole proceedings abortive. It was urged on behalf of the Crown that the important words in this passage are "not being under the control of the court," and it was contended that in the present case the jury was under the control of the court both during the outing

(1) [1915] 1 K.B. 467, 470.

to Donaghadee and the outing to Antrim, because they were in charge of the sworn jury keepers. But the mere fact that jurors are in charge of the jury keepers does not necessarily mean that they are under the control of the court. How can jurors be said to be under the control of the court when without the permission of the Court, they leave the precincts of the Courthouse where they were directed to be kept, make a journey by bus to a provincial town, divide into parties, visit shops, cafes and public houses, and enter into conversation with various people in the course of the evening? We are quite satisfied that if the Lord Chief Justice had been informed of what occurred on these two outings he would have felt compelled to direct the discharge of the jury, even at that late stage of the trial. We do not lose sight of the fact that the affidavits of the jury keepers who accompanied the party to Antrim all indicate that there was no conversation with outside persons about the Taylor case. This may well be. It seems to us, however, that in a small shop with eight persons present and two conversations at least going on it would be hard for the constable who was present to be sure that he overheard all that was said. The woman in charge of the shop recognized one of the jurors whom she had not seen for fifteen years. A most natural question for her to ask would be how he came to be in Antrim between 8 and 9 o'clock on a late October night. Indeed one would think that the arrival of a private bus with only twelve passengers in a quiet country town on such a night would be almost certain to invite questions as to who the passengers were, and what was the business which brought them there. And even if the members of the jury did not enter into any conversation about the case, one could hardly be certain that they would overhear nothing about the topic which was on everybody's lips. Moreover, what more natural than that one or two of them might buy newspapers containing reports of the case? It is to be remembered that it was upon the fact that the jury had access to newspaper

reports that the Supreme Court of New South Wales based their judgments in *R. v. Murphy* (1).

So far we have not dealt with the incident on the return journey from Antrim, when on the instructions of the foreman of the jury, the bus turned into Limestone Road and was driven along Atlantic Avenue instead of continuing straight down the Antrim Road. Mr. Hanna pointed out to us that the bus run to Antrim was taken on the evening following his closing address to the jury, in which he sought to suggest doubts about the evidence given by a witness, Mrs. Mary Shiels, that on the day of the crime she had seen the accused coming out of Baltic Avenue as she was coming out of Newington Avenue on the other side of Atlantic Avenue. Mr. Hanna has contended that the reason for the detour down Atlantic Avenue was to allow the jurors in the bus to see the place and form their own opinion on this point. This may or may not be so. We think it most unsatisfactory that some members of the jury should visit the place on their own initiative—and that too under circumstances which could give them but a poor opportunity of forming a reliable judgment—and should then, presumably, give their colleagues who had remained in the courthouse a report of the opinion which they had formed.

We have carefully considered the very full arguments which were addressed to us and all the authorities to which were referred. The remarkable fact is that in the whole range of our law reports from the earliest times to the present day there does not appear to be a single case relating to the keeping or the separation of jurors during the course of a trial, in which there occurred anything approaching the number of deviations from normal and recognized practice which took place in the present case. The cases to which we have referred—*R. v. O'Neill* (2), *R. v. Murphy* (1), *R. v. Crippen* (3), *R. v. Willmont* (4) and *R. v. Neal* (5)—were all cases in which one or at most two deviations

(1) (1869) L.R. 2 P.C. 535.
(2) (1843) 3 Cr. & Dix. 146.
(3) [1911] 1 K.B. 149.
(4) (1914) 10 Cr. App. R. 173
(5) [1949] 2 K.B. 590.

from recognized practice were relied upon. Here, however, we have a whole series of such deviations on two different evenings. An accused person is entitled to have his trial conducted according to the established and recognized procedure of the criminal law. In a trial for murder an essential element of that procedure is that the jury are not to be allowed to separate (in the sense in which we have explained that term) during any adjournments of the trial. They are to be kept together except in so far as the court may sanction in case of an emergency. They are to be under the control of the court throughout the trial and are not without the authority of the court to leave the place appointed for their stay. They are, above all, not to be allowed to mingle with the community outside. A slight and harmless deviation from one of these requirements might perhaps not vitiate a trial. But where there are so many substantial irregularities as have been disclosed by the evidence in this case the accused person is entitled to complain that his trial has not been conducted according to the established and recognized principles of our legal procedure. In visiting the public house and the cafés in Donaghadee and in going to Antrim at all, the jurors no doubt quite unwittingly, but certainly without any permission or authority whatsoever, had gone completely outside the limits which the court had drawn for their proper keeping and control. The evidence no doubt is that while in Donaghadee and Antrim they did not discuss the trial with any person whom they met there. But they certainly had opportunities of doing so which they ought not to have had, and those opportunities occurred because they had gone outside the limits drawn by the court for their keeping. In *R. v. Ketteridge* (1) and *R. v. Neal* (2) the English Court of Criminal Appeal did not consider it relevant to investigate whether or not any improper communications with the jurors had taken place. Those were cases of separation after the judge had summed up, and in *R. v. Ketteridge* (1), a single juror and in *R. v. Neal* (2) all the jurors had for

(1) [1915] 1 K.B. 467. (2) [1949] 2 K.B. 590.

a time been free from the control of the jury keepers. But in our judgment the same principle ought to be applied in the present case where during the course of the trial so many irregularities have occurred, irregularities which affect not only one or two, but all the members of the jury both individually and collectively. An accused person might justly ask how was he to test whether or not the jury had heard anything outside which might influence them in their deliberations when the only persons who could give evidence on the matter were persons who themselves—albeit quite unconsciously—were involved in the irregularities.

Nor, indeed, is the matter one which concerns the individual prisoner alone. That the due and orderly administration of justice should be maintained is a concern of the whole community. We take it that the duty of a court is not only to ensure, as far as possible, the due administration of justice in the individual case, but also to preserve the due course of procedure generally. In *R. v. Bertrand* (1), the Judicial Committee stated this to be one of their functions in dealing with colonial appeals. A trial on a capital charge is, in a comparatively small community such as ours, a matter of great public moment. The public in this country have always been accustomed to regard the seclusion of the jury as one of the solemnities which mark the procedure on a trial for murder. So long as this remains a part of our criminal procedure we think it is essential not only that privacy of the jury should be secured, but also that public confidence in the system of trial by jury in capital cases should not be shaken by any irregularity tending to throw doubt or suspicion upon the reality of such privacy. It would, in our view, be disastrous if it was thought that a series of irregularities such as those in the present case could be disregarded. If such an impression was allowed to get abroad the public would look on the locking up of the jury as a vain and useless ceremonial.

At the conclusion of his argument the Attorney-General pressed upon us that the jury's verdict should

(1) (1867) L.R. 1 P.C. 520.

be allowed to stand on the ground that no miscarriage of justice had taken place. It has, however, been held by the highest authority that an accused person is entitled to have his trial conducted in accordance with the established rules of criminal procedure, and that to deprive an accused person of the protection given by essential steps in criminal procedure constitutes in itself a miscarriage of justice. This was the ground of the decisions in *R. v. Ketteridge* (1) and *R. v. Neal* (2). One of the protections given by our law to a person on trial on a capital charge is that the jury should be "locked up" and should not be allowed to mingle with the public during any adjournment of the trial. In our opinion the established course of procedure was grossly violated by the conduct of the jurors on two successive evenings, with the result that the accused man did not receive that measure of protection to which he was entitled according to our law.

In the case of *Cooksey v. Haynes* (3) the Court of Exchequer set aside the verdict of a jury in a civil case by reason of the conduct of the jury in the jury room. The principle upon which the court acted was expressed in the following words which, in our opinion, apply with peculiar force to the present case: "If we "were to allow this verdict to stand we should open the "door to every kind of irregularity and impropriety." "It is not merely the question of what was actually "known to have been done in this particular instance, "as that which might be supposed to take place under "such or similar circumstances."

On a review of all the facts we have come to the conclusion that the appeal must be allowed.

The Attorney-General has conceded, presumably on the authority of *R. v. Murphy* (4) and *R. v. Neal* (2), that we have no power to grant a *venire de novo* or to direct a new trial, and accordingly, in the terms of

(1) [1915] 1 K.B. 467.
(2) [1949] 2 K.B. 590.
(3) (1858) 27 L.J. Ex. 371.
(4) (1869) L.R. 2 P.C. 535.

section 3 (2) of the Criminal Appeal (Northern Ireland) Act, 1930, we allow the appeal, and make an order quashing the conviction and directing a judgment and verdict of acquittal to be entered.

Appeal allowed and conviction quashed.

Solicitor for the appellant : *Anthony Lunn.*

Solicitor for the Crown : *Crown Solicitor for Belfast.*

J. P.

IN RE DOHERTY, QUINN v. CLARKE AND ANOTHER (1).

Will—Construction—Condition—Whether condition precedent or subsequent.

A testatrix devised her farm to J. C. "provided he comes to reside on the lands within twelve months of my death." Five months after the testatrix's death J. C. returned to the farm and spent one night there after which he left and never came back.

Held, that the devise showed an intention to impose a condition precedent and not a condition subsequent, and that the condition was valid but unperformed.

In re McCleary [1923] 1 I.R. 16 considered and criticised.

In determining whether a testator intended to impose a condition precedent or a condition subsequent, the facts that the condition requires only a single act to be performed, that it is capable of being performed immediately, that a time limit for its performance is allowed, and that it is drafted in the present tense, are all matters which tend to show that it should be construed as a condition precedent.

Decision of Curran J. affirmed.

APPEAL from an order of Curran J.

A testatrix by her will dated the 1st February, 1945, devised her farm complete with furniture and effects to the defendant, James Clarke, "provided he comes "to reside on the lands within twelve months of my "death," and in the event of his failing to do so the farm, etc., was to fall into residue. The will also contained an unconditional bequest of £40 to James Clarke. The final clause of the will provided "that "if any or any one of the devises or bequests herein- "before contained shall be set aside or declared void "or in anywise declared inoperative in every such "case I hereby devise and bequeath the said devises "and bequests to the devisees or legatees concerned "absolutely for his use and benefit. . . ."

The testatrix died on the 23rd April, 1947, and probate was granted to the plaintiff, an executor of the will.

(1) In the Court of Appeal before Andrews L.C.J., and Porter and Black L.JJ., January 30, 31; February 27, 1950.

James Clarke had been brought up by the testatrix and her brother, who had predeceased her. In or about the year 1941 James Clarke went to live in Eire. In September, 1947, he came to Northern Ireland in order to consult the plaintiff about the devise, and on that occasion he slept one night in the dwelling-house on the farm. He left next morning and did not afterwards return to the farm. The plaintiff now took out an originating summons to determine the following questions :—

1. Whether upon the true construction of the said will, the defendant James Clarke, in the events which have happened, has satisfied the condition attached to the gift of " the farm complete with " furniture and effects " to the said James Clarke ?
2. If the answer to question 1 be in the negative whether—
   (*a*) the said gift takes effect freed from such condition ; or
   (*b*) the said gift fails ?
3. Whether, if the answer to question 2 (*b*) be in the affirmative, the property which is the subject of the said gift—
   (*a*) falls into residue ; or
   (*b*) passes to the defendant James Clarke under the last clause of the said will?

Curran J. held that the testatrix intended to impose a condition precedent upon the devise, and that the condition was valid but that James Clarke had not fulfilled it. He further held that this did not amount to " setting aside " or " declaring void " or " inopera- " tive " the devise, and he answered the questions asked in the summons accordingly.

The defendant James Clarke now appealed to the Court of Appeal.

Jones K.C. and *Conaghan* for the appellant.

McSparran K.C. and *Moody* for the respondent Quinn.

Nicholson K.C. and *Stewart* for the other respondent.

Cur. adv. vult.

ANDREWS L.C.J. : The undue citation of authority in cases involving the construction of wills is not to be encouraged ; for little, or, indeed, as it has been said, no weight is given to the decisions in earlier cases of this character save in so far as they lay down some rule of construction applicable to the case before the court. At best they are mere illustrations which show the manner in which accepted principles of construction have been applied by other judicial minds in cases of a similar character. In *Grey v. Pearson* (1) Lord Wensleydale expressed his opinion on the subject thus : " We are bound by decided cases, for the sake " of securing as much certainty in the administration " of the law as the subject is capable of. But when " the decision is not upon some rule or principle of law, " but upon the meaning of words in instruments which " differ so much from each other, and when the proper " construction is so varied by the peculiar circum- " stances of each case, it seldom happens that the " words of one will are a sure guide for the construction " of words resembling them in another." In this judgment I shall endeavour to follow this sound advice.

The clause in the will of the testatrix, Mary Doherty, upon which the opinion of the court has been principally sought is as follows : " I devise and bequeath the farm " complete with furniture and effects to said James " Clarke " (the appellant) " provided he comes " to reside on the lands within twelve months " of my death, and in the event of his failing to do so " I direct the sale of the lands and the proceeds to go " into residue of my estate." This clause is followed by a gift of residue as to one half to the respondent, Canon Kerr, for Masses, and as to the other half to Canon Kerr for charitable or parochial purposes, as therein more particularly mentioned. The will ends with a declaration by the testatrix that if any of the devises or bequests should be " set aside or declared " void or in any wise declared inoperative " she devised and bequeathed the same to the devisees or legatees concerned absolutely for his use and benefit.

(1) (1857) 6 H.L.C. 61, 108.

In opening the appeal for Clarke, Mr. Jones intimated that his argument would be of a four-fold character: (1) That the condition in regard to residence in the devise and bequest to Clarke was a condition subsequent as distinguished from a condition precedent: (2) That, being a condition subsequent, it was bad for uncertainty: (3) That, whether it was precedent or subsequent the condition was fulfilled; and (4) That, even if the condition was good and unfilled, the devise and bequest to Clarke were saved by the last clause in the will to which I have referred. Later, however, having argued his first two points fully, Mr. Jones wisely, as it appeared to me, withdrew the last two submissions, the first of which would have involved him in hopeless inconsistency with, and would so have weakened, his previous argument; and the latter of which would have been entirely unsustainable. The final clause referred to was obviously intended to be, and was in fact, the ordinary O'Hagan clause; and, in any case, if Mr. Jones was compelled to resort to this clause by reason of his failure in his earlier submissions he would have no order of the court that the devise and bequest should be "set aside or declared void or in anywise declared "inoperative."

I pass, accordingly, to Mr. Jones's submission that the proviso in regard to his client coming to reside on the lands within twelve months of the death of the testatrix was a condition subsequent. I have no hesitation in rejecting this contention. The difference between a condition precedent and a condition subsequent is clearly defined. In the former case no gift is intended at all unless and until the condition is fulfilled; whilst in the latter case the condition is intended to put an end to the gift which had been made. This simply means that in the case of a condition precedent no interest vests, until performance of the condition; whilst in the case of a condition subsequent an interest already vested is determined by non-performance. The question as to which class a particular condition falls into depends upon the language in which the will is framed. *Fitzgerald v.*

Ryan (1). All material parts of the will must be read as a whole, and the testator's meaning and intention must be ascertained by the language he has used, which, on the principle of the judge placing himself in the testator's " armchair," may to some extent be interpreted in the light of such surrounding circumstances as doubtless exercised their influence upon his testamentary bounty.

Principles have been enunciated from time to time, which, if not universal in their application, yet afford some guide to the legal mind in determining the category into which a particular condition falls. They are based largely on common sense. Thus it has been held that if the performance of the condition involves only a single act enjoined by the testator it may readily be regarded as a condition precedent, for in such cases it is usually capable of immediate or at least early performance. If, on the other hand, the performance of the condition requires time, the courts favour the construction of an early vesting, and, at least prima facie, regard it as a condition subsequent : *Popham v. Bampfield* (2). Another generally accepted principle ,which, however, has perhaps less application to the present case, is that if a condition involves anything in the nature of consideration it is as a general rule held to be a condition precedent : *Acherley v. Vernon* (3). Again, there are many cases which could be cited from the books, of which *Acherley v. Vernon* is again one, in which it has been held that the argument in favour of a condition being regarded as precedent is stronger when the nature of the interest is such as to allow time for the performance of the act before enjoyment, and stronger still where the condition is capable of being performed *instanter* than where time is requisite : *Gulliver d. Corrie v. Ashby* (4). Finally, if the language of the will leaves it in doubt as to which class of condition is intended, the court prefers to construe it as a condition subsequent. *In re Greenwood* (5), in which a condition required a devisee

(1) [1899] 2 I.R. 637, 646.
(2) (1682) 1 Vernon 79.
(3) (1739) Willes 153, 158.
(4) (1766) 4 Burr. 1929, 1940.
(5) [1903] 1 Ch. 749.

to take a particular name, is frequently cited in support of this principle, the English Court of Appeal, which consisted of Collins, M.R., Romer and Cozens-Hardy L.JJ., holding that the condition was not intended to take effect until the devisee had come into possession of the benefit conferred upon him. Finally, as has been frequently said, the question of condition precedent or condition subsequent is one of construction and not of presumption.

With such enunciation of general principles I turn again to the will of Mary Doherty. In considering it, it is not merely permissible for us—it is our duty—to bear in mind the fact, as stated in her will in connection with a £40 legacy to the defendant, James Clarke, that he had been "reared by" the testatrix. Evidence on this point is supplemented in the affidavit of the respondent, Quinn, who tells us that James Clarke left Northern Ireland about eight years ago, namely about the year 1941, and took up residence in Eire where he lived continuously until in or about the month of September, 1947—five months after the death of the testatrix—when he returned to Northern Ireland; and, after obtaining from the caretaker the keys of the house on the farm so devised to him by the testatrix, spent one night in residence in it. This "token "residence," as I may call it, was evidently regarded by him at the time as a sufficient compliance with the condition in regard to residence imposed by the will—a hopelessly untenable assumption which no counsel could seriously argue, and which no court would for a single moment entertain.

Reading the will itself, and not travelling outside it further than to bear in mind that James Clarke had for several years before the will was made left the testatrix's house and taken up his residence in Eire, I arrive at certain definite conclusions as regards her wishes. In the first place, the testatrix obviously wished him to benefit from her estate to the extent of £40 wholly irrespective of where his residence might be. The farm was a different matter. She would prefer it not to be sold, or to form part of her residuary estate, if only the man whom she had reared from boyhood

would come to it and work it, for which she regarded his residence upon it as essential. She probably realised also that, as he was settled in another part of Ireland, it was reasonable he should have some time, which she fixed at twelve months, in which to make up his mind if he would come " to reside " on the lands. I shall explain later what, in my opinion, she meant by this. If he did so, he would get the farm ; if he did not do so it would be sold and the proceeds would fall into the residue. In my opinion it is abundantly clear that she never intended him to have any interest in, or to derive any benefit from, the farm even of a temporary character unless and until he came to reside upon it. It may be that, if within the twelve month period he elected so to come, he would be entitled to the rents and profits as from the death of the testatrix ; but until such election he had no interest whatever in it. All this was a natural will for the testatrix to make. Why should she wish him to have any rights in the farm, either as to profits, control or otherwise, unless the condition which she imposed, and which she regarded as of such importance, was complied with? This is the opinion which I have formed as regards the construction of this will apart from the cases ; and it only remains to consider whether the construction which I have held to be clearly indicated by the will itself, and which declares the condition to be a condition precedent, is in any way at variance with the principles derived from the cases and which I have enunciated above. Acting on the high authority of Willes C.J., I approach this part of the case with an earnest endeavour to avoid a construction which would frustrate the wishes and intent of the testatrix.

Having carefully considered the matter I am of opinion there is no conflict whatever, rather are those principles entirely consonant with the construction indicated by the plain words of the will. In the first place I hold that the words " provided he comes to " reside on the lands " involves only a single act, not a succession or series of acts spread over a period of time. As was pointed out during the argument the

words are not " come *and* reside," which might reasonably be interpreted as involving a permanency or at least a very substantial continuity of residence. A condition in these latter words would have been more exacting, but the testatrix did not impose it. By the language which she used she required two things, and two things only, which were simultaneous with one another, and may therefore be properly regarded as constituting a single act. One was the physical act of coming to the lands ; the other was the intent to reside—the state of mind—with which he came. This I may perhaps call the *animus manendi*—a settled intention *then* present in his mind of making the place his home. If he comes to the lands and takes up his residence with such a definite intention he complies with the condition of the devise ; and in my opinion he would not forfeit his estate merely because at a subsequent date, under, for example, altered circumstances, he changed his mind and went to reside elsewhere. Of course, if in such a case the actual residence was very brief or if the circumstances had but little changed the court might well hesitate to accept that he had had in fact an intention to reside.

Again, in the present case the allowance of the period of twelve months for compliance with the condition, and the fact also that the condition was capable of being performed immediately support the condition precedent construction. Yet another consideration referred to in the judgment of Willes C.J. in *Acherley v. Vernon* (1) may be relied upon in support of the same view, namely, that the clause is drafted in the present tense. This the learned Chief Justice referred to as " a very strong argument."

The conclusions at which I have arrived both in regard to the intention of the testatrix and as to the condition being a condition precedent are so clear as to comply fully with Mr. Jones's second submission in regard to the necessity for certainty in the condition. In saying this I am not to be understood as wishing to convey that clearness and certainty are not necessary to the validity of a condition precedent. A vague or

(1) (1739) Willes 153, 159.

ambiguous condition, even though it be a condition precedent, may well be incapable of enforcement by reason of the fact that its meaning cannot be ascertained. At the same time there can be no doubt on the authority of such cases as *Clavering v. Ellison* (1), and *In re Viscount Exmouth* (2), that it is in the case of conditions subsequent that a greater certainty is demanded by reason of the fact that such conditions defeat an already vested estate.

Mr. Jones relied strongly in the course of his argument upon *Fillingham v. Bromley* (3) and *Sifton v. Sifton* (4). Suffice it to say that the first of these cases is clearly distinguishable from the present, the words of the condition being "live *and* reside"—words which involve not merely a single act performed at one time but a continuous state or series of acts of indefinite duration. It must be obvious also that in the second of these cases, in which payments to the testator's daughter were to be made "only so long as shall "continue to reside in Canada," the condition conld not be performed by a single act. Residence in a country such as Canada also involves wholly different considerations from residence in the farm of a testatrix after her death.

It only remains for me to consider the case of *In re John McCleary, Moffat & McCleary* (5) which, as it appeared to me, was to a great extent the foundation of Mr. Jones's case. By his will, dated the 17th January, 1920, the testator, John McCleary, bequeathed to his brother Alexander McCleary, then residing in New Zealand, the residue of all the property of which he might die possessed "provided that he or any of "his sons come to live at Magherahan within one year "after my death." This bequest was followed by a gift over to another brother of the testator "in the "event of the said Alexander McCleary or any of his "sons not so coming to live at Magherahan." Under an earlier will of another brother, Robert, Alexander was already entitled to the farm of Magherahan on the

(1) (1859) 7 H.L.C. 707.
(2) (1883) 23 Ch.D. 158.
(3) (1823) Turn. & R. 530.
(4) [1938] A.C. 656.
(5) [1923] 1 I.R. 16.

death of the testator, John, which occurred on the 3rd November, 1920. Alexander returned to Ireland in October, 1920, and had ever since been living at Magherahan.

The matter came before Moore L.J. (as he then was) sitting for the Chancery Judge for the determination of three questions: (1) Whether Alexander McCleary had fulfilled the conditions? (2) Whether the residuary legacy was presently payable to him? and (3) If not, to whom the legacy and income were payable? In his judgment, however, the Lord Justice somewhat departed from these questions stating that there were two questions to be answered: (1) Is Alexander McCleary now absolutely entitled to the residue because on the facts he has sufficiently complied with the terms of the condition in the will? or (2) Alternatively, are the terms of the will binding in law or too vague, and therefore bad for uncertainty, and consequently to be rejected? Dealing with the first of these questions he held that Alexander did come to live at Magherahan within one year after the testator's death; and, in so holding, he expressly rejected the contention which had been advanced that in order to comply with the condition Alexander must continue to live there for the term of his natural life. The gift over would, he said, have taken effect had the words been "in the event "of Alexander ceasing to live at Magherahan"; but he refused to give effect to a construction which, he said, was not what the testator had expressed. After referring to *in re Arbib and Class's Contract* (1), the learned Lord Justice concluded this portion of his judgment with the words: "If then the proviso is "valid in law I hold that Alexander McCleary has "sufficiently complied with it, and that he is now "entitled to the residue absolutely" (2).

There can be no question as to the meaning of this finding. It is that, whilst there may be a legal doubt as to the validity of the proviso, there is no doubt on the facts as to compliance with its terms. Bearing this in mind I confess that I am quite unable to reconcile this finding with that which follows. Dealing

(1) [1891] 1 Ch. 601. (2) [1923] 1 I.R. at p. 18.

with the second question which the Lord Justice said must be answered as to the binding character of the condition, it would seem that, although he nowhere refers to the condition as a condition subsequent, he obviously treats it as such. I think this is apparent not only from the cases which he cites and upon which he relies, but also from his opening words that "if then the "proviso is bad in law for uncertainty, then *quacunque* "*via* Alexander is absolutely entitled" (1). This presumably means that the gift already vested could not be divested by the non-performance of a condition which was not binding because of its vagueness and uncertainty. In my opinion it was an error to hold that the condition was a condition subsequent, just as it would be an error to hold that the condition in the will of Mary Doherty in the present case was a condition subsequent. But the portion of the judgment which I have such difficulty in reconciling with the conclusions arrived at by the Lord Justice on the first question is the finding on this second question, namely, "that the provision about 'living' at "Magherahan being indefinite as to whether living "for an unascertained period, or for the whole existence of Alexander, and whether for actual or merely "constructive residence, is too vague to be enforced "and is void for uncertainty" (2). On both grounds the Lord Justice held Alexander entitled to the residue. I accept the decision as correct on the first ground, but I cannot do so upon the second ground. I do not understand how it can be said, in answer to the first question, that Alexander had complied with the terms of the condition inasmuch as he had "come "to live at Magherahan" within a year of the testator's death, and that nothing more was required of him, such as "continuing to live there for the term of his "natural life"; and that it can also be said, in answer to the second question, that the provision about living at Magherahan was indefinite as to whether it was living for an ascertained period, or for the whole existence of Alexander, and whether for actual or merely constructive residence. The inconsistencies

(1) [1923] 1 I.R. at p. 18. (2) Ibid. at p. 20.

are self-evident. Perhaps the alleged indefiniteness and uncertainty which the Lord Justice found in the condition when dealing with the second question were in a measure attributable to his substituting the word "living," which contains no element of purpose or intention, for the testator's words "come to live," which, as I pointed out in an earlier part of this judgment, are words clearly indicative of purpose.

The net result of the decision in McCleary's case so far as I am able to accept it and of my opinion in the present case is this. In the former Alexander McCleary succeeded, and was entitled to succeed, because he strictly complied with the terms of a valid and binding condition; whilst, on the other hand, James Clarke must fail because he completely neglected to carry out the terms of a precisely similar and therefore equally binding condition.

The order of Curran J., including his direction as to costs in his court, will be affirmed. We shall declare the respondent, The Very Rev. Michael Kerr, entitled to his costs of the appeal to be paid by the appellant, James Clarke. We shall make no order as to the plaintiff's costs of the appeal. We shall further direct that the costs to which the appellant was declared entitled by the order of Curran J. and the costs of the appeal which by our order we direct him to pay to the said respondent be set off the one against the other; and that the appellant will, accordingly, pay or receive (as the case may be) only the difference between such two sets of costs when taxed and ascertained.

PORTER L.J.: I agree.

Mary Doherty was the owner of a small farm in the County of Tyrone, and as far as can be judged from the bequests in the will she had no near relations surviving at the date of the will. After bequeathing a number of legacies, none of which exceeded twenty pounds, she gave a legacy of forty pounds to James Clarke, who, according to the words of the will "was "reared by us." The words of the devise are as follows: "I devise and bequeath the farm complete "with furniture and effects to said James Clarke

" provided he comes to reside on the lands within " twelve months of my death, and in the event of his " failing to do so, I direct the sale of the lands and the " proceeds to go into the residue of my estate." She evidently regarded James Clarke as her foster son, and intended that he should be the main beneficiary under her will. The words " the farm complete with " furniture and effects " with the following proviso which is in the present tense " provided he comes to " reside on the lands " indicate very clearly that she wished him to take over the farm on which he was reared as a going concern if and as soon as he possibly could. Why, then, it may be asked was he allowed twelve months in which to make up his mind ? Because, I presume, she thought that he might not be in a position to leave his employment or break his engagements in Eire without giving due notice or having to make preparation for his return to take up his abode on the farm.

What actually happened ? James Clarke has not made an affidavit. There is no allegation that he wished to return and reside on the farm. The only information we have is contained in the affidavit of the executor, in which it is not even stated that Clarke did spend a night in the house. The executor states that Clarke came to see him about the devise and intended to spend a night in the house, and that he got the keys of the house from the caretaker for that purpose, and that he then went away and had not returned since that time.

If the condition is a condition precedent, it would indeed be almost impossible to contend that he had fulfilled the residential condition by returning and spending a night in the farm house, and then abandoning the farm with the furniture and effects next morning.

I think Mr. Jones realized that the devise to his client must fail if the proviso were held to be a condition precedent, and he therefore endeavoured to show that it was a condition subsequent, and that being such it was void for uncertainty, in which event his client would take the farm, furniture and effects,

freed from any condition. It was contended that the word "reside" imported the idea of duration, and that the absence of any specified period during which the devisee was to reside on the premises, rendered the proviso so vague and uncertain that it was void as a condition subsequent. Cases were cited to us in which the proviso was held to be void for uncertainty because there was no specific limitation of time in the condition, and other cases were also cited in which the proviso was held to be valid, although there was no limitation of time at all: *Wynne v. Fletcher* (1), *Roe d. Sampson v. Down* (2); *Re Talbot-Ponsonby's Estate* (3); *Sifton v. Sifton* (4).

There is very little help to be derived from the decisions. Each case depends on its own facts, and on the language in which the devise and the condition are framed.

Mr. Jones attempted to construe the words "comes to "reside" as if they were "comes and resides," and argued that residence imported a period of indefinite duration, in which case it would be difficult, and almost impossible, to determine whether or not the devisee had fulfilled the condition, nor could anyone at the outset say how long the devisee must reside on the lands in order to fulfil the condition.

I do not think the words are the same as "comes "and resides." Residence for any particular period is not implied in the condition. It is sufficient if James Clarke "comes to reside on the lands," that is to say, if he returns to the lands with a real intention of residing there. That is a matter which it would not be difficult to determine by a consideration of the circumstances of his return. Did he give up his home in Eire? Did he return with his wife and family? Did he tell anyone he was going to reside on the farm? Did he shew by his conduct on his return that he did intend to live and work on the farm? His intention might be tested in a variety of ways. This is the will of a County Tyrone peasant woman who wanted her foster son to succeed her on the farm, and I have no

(1) (1857) 24 Beav. 430.
(2) (1787) 2 Chit. 529.
(3) [1937] 4 All E. R. 309.
(4) [1938] A.C. 656.

doubt that both the testatrix and James Clarke knew perfectly well what was meant by coming to reside on the farm. In construing a will it is the duty of the court to ensure that the wishes of a testator are carried out to the full extent permitted by the law, and I think we should be defeating the clearly expressed intention of the testatrix if we held that James Clarke was entitled to the farm, complete with furniture and effects, notwithstanding that he never resided nor intended to reside on the lands.

In my opinion the condition is precedent and not subsequent. The Lord Chief Justice has dealt so fully with *McCleary's case* (1), that it is unnecessary for me to add anything except to say that I agree that the condition in that case was precedent and was not void for uncertainty.

Black L.J. : I also agree, and have nothing to add.

Appeal dismissed.

Solicitor for the appellant : *J. McGale.*

Solicitor for the respondent Quinn : *R. H. O'Connor.*

Solicitors for the other respondent : *Hoy, Son & Murphy.*

(1) [1923] 1 I.R. 16.

J.P.

TEASE v. QUINN (1).

Criminal law—Aiding and abetting—Probation of offenders—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (24 & 25 *Geo.* 5, *c.* 15), *s.* 51—*Summary Jurisdiction and Criminal Justice Act (Northern Ireland)*, 1935 (25 & 26 *Geo.* 5, *c.* 13) *s.* 56.

To aid and abet the commission of the offence of using an uninsured motor vehicle contrary to s. 6 fo the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, constitutes the offence of using an uninsured motor vehicle contrary to that section for the purposes of s. 51 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, and the Second Schedule thereto, as amended by s. 56 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. Accordingly the benefit of the Probation of Offenders Act, 1907, cannot be given to a person against whom a charge of aiding and abetting the commission of such an offence has been proved.

The nature of aiding and abetting and the effect of the statutory provisions relating to summary proceedings against aiders and abettors considered.

CASE STATED by the resident magistrate sitting at Stewartstown Petty Sessions.

Mark Kelly was charged at Stewartstown Petty Sessions with the offence of using a motor vehicle on a public highway contrary to s. 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930. The respondent Quinn was charged at the same time with aiding and abetting Mark Kelly in the commission of the offence. The resident magistrate convicted Kelly and found that the charge against Quinn was proved, but in view of all the circumstances he decided without proceeding to a conviction against him to dismiss the charge under the Probation of Offenders Act, 1907. At the request of the prosecutor the resident magistrate stated this case.

Nicholson K.C. and *Lowry* for the appellant.

McGonigal for the respondent.

Cur. adv. vult.

(1) In the King's Bench Division before Porter L.J. and Sheil J.; February 9, 10, 13, 1950.

PORTER L.J.: This is a case stated by the resident magistrate sitting at Stewartstown Petty Sessions in pursuance of an application made by the appellant, who is a District Inspector of the Royal Ulster Constabulary. On the 6th day of April, 1949, at the said Petty Sessions the appellant preferred a complaint against the respondent as follows:—

"Whereas a complaint has been made to me that "on the 17th day of March, 1949, at Castlefarm, "Stewartstown . . . one Mark Kelly unlawfully "did use a certain motor car on the public "highway there for a purpose for which there "was not in force in relation to such user of "the motor car a policy of insurance or such security "in respect of third party risks as complies with "the requirements of Part II of 20 & 21 Geo. V, "cap 24 and Part II of 24 & 25 Geo. V, cap 15, and "that you at the same time and place did aid abet "counsel and procure the said Mark Kelly to commit "the said offence."

On the hearing of the complaint evidence was given by one person only, namely, Sergeant Gibson, of the Royal Ulster Constabulary, and the resident magistrate found the following facts:—

The respondent was in Stewartstown on the evening of the 17th March, 1949, in company with Mark Kelly. They saw a motor car belonging to Thomas Corry, and Kelly, without any authority, got into the driving seat. The respondent then got into the car and Kelly drove it to the aerodrome where it overturned and was badly damaged. There was no insurance covering the car while it was being so used.

The resident magistrate found that the respondent had aided and abetted Mark Kelly in using the car on the public highway in contravention of the statutes mentioned.

The case was adjourned on two occasions and the resident magistrate gave his decision on the 5th October, 1949, having previously been informed that the respondent was 18 years of age and had been of good behaviour during the intervening period and

also prior to the case. The court held the charge proved, but having regard to the age of the respondent, his previous good character and to the fact that he was only a passenger in the car, without proceeding to a conviction dismissed the charge on the Probation of Offenders Act, 1907, on payment of two shillings costs, without suspension or disqualification of driving licence.

The question for this court is whether he was right in law in applying the Probation of Offenders Act, 1907, in respect of the said complaint.

Mark Kelly, in respect of his offence had been fined £5 with suspension of his driving licence for two years, and the case made by the appellant was that by virtue of section 51 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, and the Second Schedule to that Act, and also of section 56 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, the resident magistrate was bound to proceed to a conviction of the respondent and to suspend his driving licence for at least twelve months, or disqualify him from holding a driving licence for a similar period.

Section 56 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, substitutes the following for section 51 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 :—

> " 51. Where a person is charged before a court " of summary jurisdiction with any of the offences " set out in the Second Schedule to this Act and " the court thinks that the charge is proved, the " provisions of the Probation of Offenders Act, " 1907, shall not apply to that person."

One of the offences set out in the second schedule is :—

> " 3. An offence of using a motor car in contra- " vention of section 6 of the Act of 1930."

Was that the offence with which the respondent was charged? Kelly had been convicted of using the motor car in contravention of section 6 of the 1930 Act, but the respondent was charged not with " using " but with aiding and abetting Kelly in using the motor car, and Mr. McGonigal contended that the

offence of " using " was a different offence from that of " aiding and abetting " in using the motor car, and as the latter was not mentioned in the Second Schedule, the resident magistrate was entitled to give the respondent the benefit of the Probation of Offenders Act. Further, he referred to the words of section 6 of the 1930 Act ; " it shall not be lawful for any person " to use, or to cause or permit any other person to use, " a motor car on a public highway . . ." and so on, and contended that three separate offences were indicated : (*a*) using, (*b*) causing another to use, and (*c*) permitting another to use, and that of these three offences using was the only one mentioned in the Second Schedule, and therefore the Probation of Offenders Act could, in an appropriate case, be extended to a person who was charged with causing or with permitting another person to use a motor car on the public highway in contravention of the section. He argued that the words of the Second Schedule applied only to actual user and if they could not be applied to the offence of causing or permitting another to use the motor car, they could not apply to the offence of aiding and abetting another to use it, for that would be a *reductio ad absurdum.*

Mr. Lowry, for the appellant, cited a number of cases to shew that in cases of misdemeanour a person who aided and abetted was in the position of a principal in point of law, and he referred us to section 49 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, which re-enacts section 22 of the Petty Sessions (Ireland) Act, 1851,—both these sections in this respect following section 5 of the English Summary Jurisdiction Act, 1848.

Fairburn v. Evans (1), a case under the Sunday Observance Act, 1677, was relied on by Mr. McGonigal to shew that the offence of aiding and abetting was separate and distinct from the offence with which the principal offender was charged. In that case the appellant was charged with aiding and abetting one Eugenio Cresci in exercising his ordinary calling of a refreshment house-keeper on the Lord's Day. The appellant was employed at a colliery and had bought

(1) [1916] 1 K.B. 218.

sweets from Cresci on the day in question and also on several previous Sundays. It was argued in that case that the appellant could not have been charged with or convicted of the offence committed by Cresci, but, in the course of the argument, Low J. said: "a "person may be an aider and abettor although he "cannot commit the original offence. It has been "held that a woman can be indicted for aiding and "abetting the crime of rape." The Court (Ridley, Lush and Low JJ.) held that although the appellant was not assisting in *selling*, he did by *buying* assist Cresci in exercising his ordinary calling on the Lord's Day. The decision does shew that there may be cases in which the aider and abettor cannot be *charged* as an original offender, because it could not be suggested that the purchase by the appellant of some sweets was the exercise of *his* ordinary trade or calling, but I do not see how this proves that the offence proved against the appellant was different from the offence of which Kelly was convicted.

Under section 49 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, the person who aids and abets is *liable* to be proceeded against and convicted for the offence either together with the principal offender or before or after his conviction, and is liable on conviction to the same punishment.

In *Du Cros v. Lambourne* (1), it was held that a person who aided and abetted the driver of a motor car in driving at a speed dangerous to the public was rightly convicted upon an information charging him with having committed the offence as a principal offender. That was a case under section 5 of the English Summary Jurisdiction Act, 1848, which corresponds to section 49 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, and the Motor Car Act, 1903, section 1; and, as in the present case, there were two persons concerned as participants in the offence—that of driving at a speed dangerous to the public—yet the one who was merely aiding and abetting was liable to be charged as a principal offender and on conviction to be punished as

(1) [1907] 1 K.B. 40.

such. Whether he is charged with committing the offence with aiding and abetting another in the commission of the offence is immaterial, the charge against him is to be treated in law as the same in degree as that charged against the principal offender : see the judgment of Reading L.C.J. in *Gould & Co. v. Houghton* (1). Similarly, in a case of treason those who are present aiding and abetting are liable to be charged in the indictment and also to be convicted and punished as principals in the first degree.

A comparison with cases of felony in which the punishment of principals in the first degree and of principals in the second degree is the same, shews that however they may be described, there is only one crime in point of law.

In *Mackalley's case* (2), a very old case which has been cited over and over again in subsequent cases, it is laid down that a person indicted as a principal in the first degree may be found guilty as a principal in the second degree, and a person indicted as an aider and abettor may be found guilty as a principal in the first degree.

Upon exceptions taken in that case it was resolved by all the judges as follows :—

" So if A B and C are indicted for killing J. S. and " upon the evidence it appears that B struck, and " A and C were present etc., in this case the indict- " ment is not pursued in the circumstance ; and yet " it is sufficient to maintain the indictment, for the " evidence agrees with the effect of the indictment, " and so the variance from the circumstance of the " indictment is not material ; for it shall be adjudged " in law the wound (stroke) of every one of them, " and is as strongly the act of the others, as if they " all three had held the weapon, and had all together " struck the deceased."

Section 49 is a section dealing merely with procedure, and does not create a separate and distinct substantive offence. Mr. Nicholson pointed out that the offence of using a motor car, referred to in the Second Schedule to the 1934 Act, is the same offence as that referred to in the words of section 6 of the 1930 Act—" it shall not

(1) [1921] 1 K.B. 509, 513. (2) (1611) 9 Co. Rep. 616.

" be lawful for any person to use a motor car " and so on—and if the latter words include both the principal offender and the aider and abettor, as they must do, it follows that the words in the schedule must have the same meaning. There is in point of law only one misdemeanour in which the two participants, Kelly and Quinn, though they played different parts, were yet liable to be proceeded against, convicted and punished as principals.

In *Homolka v. Osmond* (1), H was convicted of aiding and abetting G who, being a person disqualified from holding or obtaining a driving licence, while disqualified unlawfully drove a motor vehicle on a road contrary to the Road Traffic Act, 1930, section 7 (4) and the Summary Jurisdiction Act, 1848, section 5. The summons was issued more than six months after the alleged offence, but under section 7 (5) the summons could have been brought within a period of one year from the date of the offence, and it was brought within that period.

It was, however, contended that section 7 (5) applied only to the principal offences set out in sub-section (4), one of which was the driving of a motor vehicle by a person who was disqualified for holding or obtaining a licence whilst so driving—and not to the offence of aiding and abetting that offence.

The Court (Hewart L.C.J., Charles and Singleton J.J.) held that the contention was manifestly at variance with the law so clearly laid down in *Gould & Co. v. Houghton* (2). The same principle was affirmed in *Wessel v. Carter Paterson* (3).

There is, therefore, clear authority on the point. The question submitted to us must be answered in the negative.

SHEIL J.: I concur.

Appeal allowed.

Solicitor for the appellant: *Chief Crown Solicitor.*

Solicitor for the respondent: *E. M. Doris.*

J. P.

(1) [1939] 1 All.E.R. 154.
(2) [1921] 1 K.B. 509.
(3) [1947] 2 All. E. R. 280.

IN RE CARLISLE, DECEASED : BELFAST BANK EXECUTOR & TRUSTEE CO. v. PATTERSON & OTHERS (1).

Will—Construction—Oral statements by testator, whether admissible.

Where there are rival claimants for a benefit under a will and it is shown that one claimant alone completely and accurately answers to the testator's description, there is a very strong presumption that he is entitled to benefit, though this presumption may be rebutted. Evidence of the testator's circumstances and of his relationship to the two claimants is admissible to rebut the presumption. Evidence of statements made by the testator about the contents of his will is not admissible to rebut the presumption, for evidence of statements showing testamentary intention can only be received where there is equivocation.

A testator left a legacy to "John Patterson of the Gates, "Ballydyan." The legacy was claimed by John Patterson of the Hill, Ballydyan, and John Patterson of Glenelm, Ballydyan. It was found that the family of Patterson of Glenelm was formerly called "Patterson of the Gates," and that this mode of referring to the family was still known in the neighbourhood.

Held, that there was a presumption that John Patterson of Glenelm was entitled to the legacy, and that evidence of statements made by the testator that he did not intend to benefit John Patterson of Glenelm were not admissible as evidence of testamentary intention.

Mistakes in the wording of a will can only be corrected, if at all, by a court of probate and not by a court of construction, except where the correction can be made as a matter of construction of the will itself and without extrinsic evidence of the testator's intention.

ORIGINATING SUMMONS.

By his will made in October, 1948, the testator left £1,000 to "John Patterson of the Gates, Ballydyan," which legacy had been contained in an earlier will made in March, 1948. There were two John Pattersons in Ballydyan, John Patterson of the Hill and John Patterson of Glenelm. Each of these claimed the legacy, and this summons was taken out to determine which, if either, of the claimants was entitled.

As the evidence on the affidavits filed on behalf of the claimants was conflicting Black L.J. adjourned the

(1) In the Chancery Division before Black L.J., Oct. 31, Nov. 16, 17, 30, 1949; Feb. 10, 1950.

hearing to take oral evidence. It appeared from this evidence that both claimants had assisted the testator on his farm but that John Patterson of the Hill had had a more recent association with him. Evidence was given that the testator had told John Patterson of the Hill that he would leave him £1,000, and statements of the testator made at the making of the earlier will in March, 1948, to the effect that the John Patterson whom he wished to benefit was not John Patterson of Glenelm were tendered in evidence.

The learned judge found as a fact that "Glenelm" was formerly called "the Gates" and was still known locally by that name.

Lowry for the plaintiff.

Moody for the defendant, Patterson of Glenelm.

Maginess K.C. for the defendant, Patterson of the Hill.

Babington for the residuary legatees.

Cur. adv. vult.

BLACK L.J.: I have already disposed of the question of fact which was so bitterly contested between Mr. Maginess's client, whom I shall call John Patterson of the Hill, and Mr. Moody's client, whom I shall call John Patterson of Glenelm. That question was whether among the persons known to the testator there was anyone who completely answered to and satisfied the description "John Patterson of the Gates, Ballydyan." It was quite clear that John Patterson of the Hill was never known or spoken of as John Patterson of the Gates and that he could not be said to answer in any way to the description "John Patterson of the Gates." And on the evidence—affidavit and oral—I was satisfied that John Patterson of Glenelm and his forebears were constantly spoken of in the neighbourhood as the Pattersons of the Gates in order to distinguish them from the numerous other Pattersons in the district, and that this mode of referring to them is still known, notwithstanding that some thirty-five years ago they

gave their house the more high-sounding name of "Glenelm". Accordingly, I came to the conclusion that John Patterson of Glenelm, who was admittedly known to the testator, completely answered to and satisfied the description of "John Patterson of the "Gates" and would have been recognized by the testator under that description.

The question which I have now to decide is as to how the bequest in Mr. Carlisle's will to John Patterson of the Gates, Ballydyan, is to be construed in the light of this finding of fact. I emphasize at the outset that the matter is before this court merely as a question of construction. Accordingly, my task is not to find out what the testator intended to say in his will. All that I am entitled to do is to endeavour to elucidate, according to the canons of construction which I am bound to follow, the meaning of what the testator has in fact said. As Parke J. said in the oft-cited passage from his judgment in *Doe d. Gwillim v. Gwillim* (1) : "In "expounding a will, the Court is to ascertain, not what "the testor actually intended, as contradistinguished "from what his words express, but what is the meaning "of the words he has used." Or as Lord Greene M.R. puts it in the recent case of *Re Norton* (2) : "In a Court "of Law the intention of the testator is the con-"struction which the Court puts upon his language, "that and nothing else."

On behalf of John Patterson of Glenelm it is contended that once it is established that there is a person known to the testator who completely and accurately answers the description in the will of the legatee, this person alone can take the legacy, and that evidence is not admissible for the purpose of showing that some other person was meant. For this contention there is undoubtedly a wealth of authority to be found both in the text-books and in reported cases. It will be found stated in practically these terms in Jarman on Wills 7th Ed. Vol. I at p. 497, and at pp. 502-3, in Theobald on Wills 10th Ed. at pp. 98 and 202 and in the Laws of England (Hailsham edition) Vol. 34 pp. 170-171

(1) (1833) 5 B. & Ad. 122, 129.

(2) (1949) L.J.R. 568.

paragraphs 224 and 225. It appears to be entirely in accord with what is laid down as an inflexible rule of construction in Proposition II in Sir James Wigram's classic treatise on Extrinsic Evidence. It is supported in decisions and dicta from *Del Mare v. Rebello* (1), to *Sherratt v. Mountford* (2). And it is not easily distinguishable in principle from what was decided by the House of Lords in *Doe d. Oxenden v. Chichester* (3).

In view, however, of the speeches in the House of Lords in *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children* (4), it cannot be said that there is a rigid and inflexible rule that where it is found that one person and one person only completely and accurately answers the description of the legatee in the will then the inquiry must stop and no evidence is admissible to establish that some other person is the beneficiary. The true rule, it appears, must be taken to be that in such a case there is a strong presumption that the person accurately described is the person to benefit and that this presumption is one which in Lord Loreburn's words, "cannot be overcome except in "exceptional circumstances" (5), or as Lord Parmoor puts it, "can only be rebutted in some abnormal case "of a special character." (6). It is argued on behalf of John Patterson of the Hill that the present case is one in which it should be taken that the presumption has been sufficiently rebutted. It is rather remarkable that the only reported case, so far as the industry of counsel has been able to discover, in which such a presumption was successfully rebutted is the Irish case of *Henderson v. Henderson* (7), a case which appears to have had the misfortune of incurring the disapproval of practically all the text-book writers.

In considering the contention that the presumption in the present case in favour of John Patterson of Glenelm has been rebutted it is first necessary to see what evidence is legally admissible. Part of the

(1) (1792) 3 Bro.C.C. 446.
(2) (1873) L.R. 8 Ch. 928.
(3) (1816) 4 Dow. 65.
(4) [1915] A.C. 207
(5) Ibid. at 212.
(6) Ibid. at 216.
(7) [1905] 1 I.R. 353.

evidence adduced was evidence to show the circumstances surrounding the testator at the time of making his will and his acquaintance and relationship with the rival claimants during the last years and months of his life. Another part of the evidence was evidence directed to show by statements made by the testator to his solicitor at the time of making his will (or rather, I should say, made by him at the time of making a previous will on the 1st March, 1948), that the person he intended to benefit was not John Patterson of Glenelm, and to show that subsequent to the date of that will the testator had conveyed to John Patterson of the Hill, not, curiously enough, according to that claimant's evidence that he had already left him a legacy of £1,000, but that he was going to leave him a legacy of £1,000.

As regards the evidence of the testator's circumstances and his relationship with the two claimants, I think it is quite clear that this evidence falls far short of being sufficient to rebut the presumption that John Patterson of Glenelm—the John Patterson actually known as John Patterson of the Gates—is the person entitled to the legacy. Suffice it to say that the evidence of this type, pointing to John Patterson of the Hill as the beneficiary, is much weaker than the evidence supporting the claim of the Scottish society which, in the case of *National Society for the Prevention of Cruelty to Children v. Scottish National Society for the Prevention of Cruelty to Children* (1), the House of Lords held to be insufficient to rebut the strong presumption in favour of the legatee accurately named in the will.

The other part of the evidence was evidence seeking to prove verbal expressions by the testator of his testamentary intentions. It is well settled that in a court of construction, evidence of this type, that is to say evidence to show what a testator really intended to provide by his will, in other words evidence dehors the will of his expressed intentions, is admissible in one case and in one case only, namely, where it is found after applying the usual canons of construction that

(1) [1915] A.C. 207.

there is what is called an equivocation. "The only "case in which evidence of this kind can be received "is where the description of the legatee, or of the "thing bequeathed, is equally applicable in all its "parts to two persons, or to two things" (per Lord Cairns L.C. in *Charter v. Charter* (1).) The present case is clearly not a case of this type. The description in the will of the legatee is clearly applicable to John Patterson of Glenelm. It could not possibly be said to be equally applicable to John Patterson of the Hill. It therefore follows that in the present case expressions of the testator's intention are not admissible in evidence as such.

I have said not admissible *as such*, because of an ingenious argument which was addressed to me by Mr. Lowry. Conceding that statements by a testator of his intention are not admissible in evidence as such, except for the purpose of resolving an equivocation, Mr. Lowry nevertheless contended that the testator's conversation with Mr. McRobert when he was making the will of the 1st March, 1948, was admissible not as an expression of his testamentary intention but as showing whom he meant or did not mean by "John "Patterson of the Gates." No doubt a document or a statement, which is not admissible for the purpose of evidencing an expression of intention, may, nevertheless, be admissible in evidence for the purpose, for example, of proving that the testator knew a person by a certain name (*In re Ofner* (2)). The argument in the present case was that the testator's conversation with Mr. McRobert on 1st March, 1948, showed that by the phrase "John Patterson of the Gates" he did not mean John Patterson of Glenelm and that, accordingly, the will ought to be read as if the words "the "Gates" were omitted. The omission of these words would, it was contended, enable the court to hold on the evidence that the John Patterson designated in the will as the legatee was John Patterson of the Hill.

I am not at all convinced that the conversation between the testator and Mr. McRobert is admissible

(1) (1874) L.R. 7 H.L. 364, 377.

(2) [1909] 1 Ch. 60.

on this basis in proceedings brought to construe the will. To put it at its highest, the best that John Patterson of the Hill can extract from this conversation is that the testator indicated that he did not intend the legacy for John Patterson of Glenelm, and, inferentially, that by the phrase " John Patterson of the Gates " he did not mean John Patterson of Glenelm. In the case of *In re Fish* (1), a testator had given his residuary estate to his niece, Eliza Waterhouse. He had no niece bearing that name but he had a legitimate grandniece called Eliza Waterhouse and also an illegitimate grandniece bearing the same name. The latter claimed to be entitled under the will and tendered evidence in support of her claim. From the judgment of Kay L.J. it appears that the nature of the evidence which she tendered was that she lived with the testator and was sometimes called by him his niece. Her claim was rejected by the Court of Appeal where Kay L.J. spoke of the evidence sought to be adduced as really an attempt to bring in evidence of what the testator intended under the guise of evidence of the surrounding circumstances.

And in the case of *Khoo Hooi Leong v. Khoo Hean Kwee* (2), Lord Phillimore, delivering the opinion of the Privy Council, says : " It is right in construing such " a document as a settlement or a will that the Court " should put itself into the position of the settlor or " the testator and construe his language according to " his knowledge. But this does not mean that the " Court is to look anywhere for the intentions of a " settlor except to the document itself. In these " matters the caution administered by Kay L.J. in " the case of *In re Fish* (1) must always be borne in " mind, and the Court must be on its guard against " letting in extrinsic evidence of what the settlor " intended under the guise of evidence as to the " circumstances existing when he made the settle- " ment." See too the observations of Cozens-Hardy M.R. in *In re Pearce* (3). I think it would be highly dangerous to regard the testator's conversation as

(1) [1894] 2 Ch. 83.
(2) [1926] A.C. 529, 538.
(3) [1914] 1 Ch. 254.

deposed to by Mr. McRobert on any other footing than as merely an expression of a testamentary intention. And if it is to be regarded merely on this footing it is clearly inadmissible in evidence for the purpose of construing the will.

Even, however, if I accepted Mr. Lowry's contention that the testator's conversation with Mr. McRobert is admissible for the purpose of showing that by the phrase "John Patterson of the Gates" the testator did not mean John Patterson of Glenelm, I should still be unable to decide the issue in these proceedings in favour of John Patterson of the Hill. The will has been admitted to probate. I must take it as I find it and I must regard it as the will of a testator of testamentary capacity who knew and approved of its contents. From the evidence which I have heard I believe that the testator would have had no doubt but that a reference to the Pattersons of the Gates was a reference to the Pattersons of Glenelm and that a reference to John Patterson of the Gates was a reference to John Patterson of Glenelm. If he is to be regarded as having known and approved the contents of the will, I cannot, sitting in a court of construction, construe the will by omitting or disregarding a phrase the meaning of which, in so far as I can form an opinion, the testator must have clearly known. The miscarriage, if miscarriage there was, was not the insertion in the will of a phrase which the testator intended to use but which he understood in a sense different from its ordinary natural meaning, but was the insertion, through a mistake arising from the testator's weakness and his deafness and the consequent difficulty of communicating with him, of a phrase the meaning of which he knew quite well but which he never intended should be in the will at all. If this was the position, then what it amounted to was that the testator did not know or approve of that portion of the contents of his will which described the intended legatee John Patterson as "of the Gates." Such a miscarriage cannot be set right by a court of construction. It can only be dealt with, if at all, by a Court of Probate (Jarman on Wills 7th Ed. Vol. I p. 45; Theobald on Wills 10th Ed. p. 93; Laws of England

(Hailsham Edition) Vol. 34 p. 162 para. 213 and note (*b*).) Any correction of a will as, for example, by the deletion of words shown to have been mistakenly inserted in it can only be effected, if at all, by a Court of Probate (*Re Bywater* (1)). I am not sitting here as a Probate Judge. In a court of construction the probate must be accepted as conclusive of what the will is which has to be construed. I must, accordingly, construe the will as I find it in the probate, that is to say, with the description of the legatee as John Patterson of the Gates. No order has been obtained from the Probate Court, nor, indeed, has any application been made to that court, for the deletion of the words " of the Gates." And, of course, I deliberately refrain from indicating any opinion whatever as to how, upon the evidence before me, the matter might be dealt with if such an application were made to the Probate Judge.

Declaration accordingly.

Solicitors for the plaintiff : *J. Murland & Co.*

Solicitor for the first defendant : *D. Barbour Simpson.*

Solicitors for the second defendant : *W. G. Maginess & Son.*

Solicitors for residuary legatees : *Pollock & Mayrs.*

J. P.

(1) (1881) 18 Ch.D. 17.

GETTY v. ANTRIM COUNTY COUNCIL (1).

Malicious Injury—Whether dismantling a machine is "damage"—Parts of machine removed—Measure of compensation—Grand Jury (Ireland) Act, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 135—*Malicious Damage Act*, 1861 (24 & 25 *Vict.*, *c.* 97), *s.* 15—*Local Government (Ireland) Act*, 1898 (61 & 62 *Vict.*, *c.* 37), *s.* 5 (1).

The applicant claimed compensation for damage to two tractor ploughs. The ploughs had been left in a field by the applicant's son, and on his return he found that they had been dismantled. Some parts had been removed, but the remaining parts were undamaged. There was no evidence as to what had become of the missing parts.

Held, (i) that the dismantling of the ploughs constituted damage to them within the meaning of the Malicious Damage Act, 1861, and that the applicant was therefore entitled to recover compensation; (ii) that compensation was limited to the cost of reassembling the ploughs, there being no evidence that the missing parts had been damaged or destroyed.

Decisions concerning larceny subsequent to malicious damage considered.

APPEAL to the Judge of Assize from a decree of the Acting County Court Judge for Antrim.

On the 26th December, 1949, the applicant's son left two tractor ploughs in a field on the applicant's farm some distance from the dwellinghouse, and on his return two days later he found that the ploughs had been dismantled and that some of the vital parts were missing. There was no evidence as to what had become of these, but the remaining parts were undamaged. In view of two earlier incidents it seemed that the ploughs had been dismantled for the purpose of injuring the applicant, and in particular in order to impede him in qualifying for a ploughing subsidy, but in fact he did not suffer consequential damage through being deprived of the use of the ploughs. At the hearing of the application the county court judge gave a decree for £32, being the cost of re-instating the

(1) Before Black L.J. sitting as Judge of Assize; March 22; April 20, 1950.

ploughs and replacing the lost parts. The respondents thereupon appealed.

Conaghan for the applicant.

McVeigh K.C. and *Babington* for the respondents.

BLACK L.J.: This is an appeal from an award of compensation by the county court judge to the applicant, Mr. James Getty, for malicious damage to two Ford Ferguson ploughs.

It appears from the evidence that Mr. Getty had been subjected to an amount of annoyance for some time past. On the 31st October, 1949 (Halloweve) a heavy stone was thrown through one of the windows of his dwelling house. This conduct was repeated on Christmas eve. Mr. Getty reported both these incidents to the police. Apparently this further provoked his annoyers, for within the next few days there occurred the matters which give rise to the present claim. The applicant had two Ford Ferguson tractor ploughs on lands some distance from his dwelling-house. His son had been ploughing with them on Monday, the 26th December. Neither the applicant nor his son was out at these lands on Tuesday, the 27th. But on returning to resume his ploughing on Wednesday, 28th, Mr. Getty's son found that in the meantime the ploughs had been unscrewed and taken to pieces, and that vital parts had been taken away, leaving only the heaviest portions of the ploughs. So far as could be seen nothing had been broken; no damage had been done to the parts left behind; but the ploughs had been rendered useless and the applicant had to get new parts fitted. No trace has since been found of the parts which were carried away. The field in which the ploughs had been left adjoined a public road, and the ploughs themselves were about fifty yards from the road. One cannot help thinking that the outrage was deliberately and shrewdly timed for the purpose of causing annoyance and injury to the applicant. In order to qualify for the government subsidy ploughing

had to be completed by the 31st December. It was, no doubt, thought that with his ploughs rendered useless the applicant would be unable to get his ploughing completed by that date. Fortunately, however, he succeeded in defeating this design; with ploughs lent to him by his friends he got all his ploughing finished in time. The applicant, accordingly, does not make any claim for compensation for loss of use of the ploughs until they could be repaired, and so this court has not, in the present case, to undertake the task of deciding between the view taken by Holmes L.J. in the curiously similar case of *Brackley Co-operative Society v. Tyrone County Council* (1), and the contrary view adopted by the Court of Appeal in *Noblett v. Leitrim County Council* (2).

By section 5 (1) of the Local Government (Ireland) Act, 1898, it was provided that section 135 and the following sections of the Grand Juries Act, 1836, so far as unrepealed, should extend to the case of maliciously setting fire to, destroying or injuring property of any description, whether real or personal, subject to the proviso that this Act of 1898 should not extend the application of the said sections of the Grand Juries Act to any case except where the malicious act done was a crime punishable on indictment under the Malicious Damage Act, 1861.

By section 15 of the Malicious Damage Act, 1861, it was enacted that whoever should unlawfully and maliciously cut, break or destroy, or damage with intent to destroy, or to render useless, inter alia, any machine or engine used or intended to be used for ploughing, should be guilty of felony and be liable, on conviction, to be kept in penal servitude for any term not exceeding seven years. The applicant's Ford Ferguson tractor ploughs were clearly machines or engines intended to be used for ploughing within the meaning of this section of the Act of 1861 (*Noblett v. Leitrim County Council* (2).) But would the mere dismantling of a machine without breaking or injuring any of its component parts, be sufficient to constitute

(1) Unreported: referred to in a note in 1 N.I.J. 146.

(2) [1920] 2 I.R. 143.

the offence under the section of damaging the machine with intent to render it useless? In my opinion it clearly would. I think this is concluded by *R. v. Tacey* (1), a decision on an earlier statute, and by *Reg. v. Fisher* (2), a decision on section 15 itself. Accordingly I am satisfied that the dismantling of the applicant's ploughs was a crime punishable on indictment under the Malicious Damage Act, 1861.

Mr. Babington, however, argues, on behalf of the County Council, that even if this conclusion is correct it does not follow that the applicant is entitled to compensation under section 5 (1) of the Act of 1898. He points out that under that section the compensation provisions of the Grand Juries Act, 1836, are extended only to the case of maliciously setting fire to, destroying, or *injuring* property, whereas the operative words in section 15 of the Act of 1861 are cut break destroy or *damage* and that section 135 of the Act of 1836 provided for compensation in the case of *damaging, injuring* or destroying certain forms of property. He contends that the use of the word "injuring" and the omission of the word "damaging" in section 5 (1) of the Act of 1898, as contrasted with the use of both words in section 135 of the Act of 1836, indicate that the Legislature had a distinction in mind and intended that section 5 (1) should not apply to all cases of damage to property punishable on indictment under the Act of 1861, but only to cases where property could be said to have been injured as well as damaged. The word injury, he submits, bears a narrower meaning than the word damage, and denotes something in the nature of a breaking or lesion. Accordingly, he contends that even if the malicious dismantling of a machine, without injuring any part of the machine, amounts to the damaging of the machine so as to constitute an offence under section 15 of the Act of 1861, yet compensation will not be recoverable under section 5 (1) of the Act of 1898 unless some breakage or other physical injury of a similar nature was done to some part or parts of the machine. I cannot accept this contention. To

(1) (1821) Russ. & Ry. 452. (2) (1865) L.R. 1 C.C.R. 7.

my mind, the distinction which Mr. Babington seeks to draw is much too fine, and I do not think that any such distinction was in the mind of the Legislature. If the dismantling of a machine constitutes a damage to the machine under the wording of section 15 of the Act of 1861 it equally, in my opinion, constitutes an injury to the machine under the wording of section 5 (1) of the Act of 1898. Accordingly, in the present case I am satisfied that the applicant is entitled to recover compensation for the damage done to his ploughs.

What, then, is the measure of the compensation to which the applicant is entitled? It is agreed that the total loss sustained by him by reason of the dismantling of the ploughs, and the loss of the parts which were removed, amounted to £32. Is the applicant entitled to recover the whole of this amount? If no damage was done to any of the parts of the ploughs in the course of dismantling them, then the immediate result of the process of taking the machines apart was simply to convert them into a collection of uninjured chattels. If the person or persons who engaged in the operation had contented themselves with taking the ploughs apart, and had left the parts lying loose in the field, and if the applicant's son had recovered all the parts safely when he returned to the field on the 28th December, then I take it that in the circumstances of the present case (there being no suggestion of any claim for consequential damage by reason of the loss of the use of the machines) the measure of the compensation which the applicant could legitimately have claimed would have simply been the cost of re-assembling the machines. If, however, any of the parts, when recovered, had been found to have been damaged, he would also have been entitled to recover the cost of repairing these parts. In actual fact, however, there is no evidence whatever as to what happened to the parts of the machines which were removed. There is no evidence that any of these chattels were damaged in any way. It is suggested that as the motive of the person or persons who dismantled the ploughs was to injure the applicant, and that as some of the missing parts were fairly heavy,

the probabilities are that they were disposed of by being thrown into a river or a bog hole. If this could be established the applicant would claim compensation for the parts so disposed of on the authority of such cases as *Ryan v. Tipperary County Council* (1). But in the absence of any evidence on the point, I am not able to hold that the loose parts were in fact disposed of in this way. The onus of establishing his case is on the applicant. He has not succeeded in convincing me that any damage was done to the ploughs or their parts except the damage constituted by the actual dismantling. It may well be that the parts were disposed of as the applicant suggests. On the other hand, they may simply have been removed and converted to their own use by the parties who dismantled the ploughs. Or perhaps these parties may have got rid of some of the heavier and more unwieldy parts and may have retained such of the smaller ones as they thought might come in useful. All this, however, is in the realm of conjecture. I do not leave out of sight that the primary motive of the persons who engaged in the operation was, no doubt, to injure the applicant. But when they had dismantled his ploughs they could injure him equally effectively by stealing the loose parts as by destroying them, and I do not imagine that the miscreants, who deliberately damaged the applicant's property by taking it to pieces, would have any nice feelings after dismembering it, as to whether they would destroy or would steal the loose parts. If it could have been established that any of the loose parts had been destroyed or damaged, those parts would have been the subject matter of compensation. But the evidence is quite consistent with the loose parts having simply been stolen, and ordinarily compensation cannot be recovered under the Malicious Injury code for property stolen but not injured or destroyed.

There are, however, cases, of which *Tyler & Sons v. Cork County Council* (2) is perhaps the best known, in which it has been held that, where property is stolen

(1) (1921) 55 I.L.T.R. 89. (2) [1921] 2 I.R. 8.

as a *consequence* of a malicious injury for which compensation is recoverable, the value of the property stolen should be taken into account in measuring the amount of the compensation to be awarded. In *Tyler's case* (1) a riotous attack had been made on a boot and shoe shop. The rioters demolished the shop front and flung a quantity of the stock-in-trade into the street. They had no intention of committing any larceny and did not themselves commit any larceny, but quantities of the stock were stolen by unascertained persons who took the opportunity of plundering during the confusion. It was held by the Court of Appeal that the amount of compensation to be awarded to the owners of the shop should include the value of the stolen goods, since the theft of these goods was the natural and probable consequence of the malicious act of the rioters in demolishing the shop and scattering the stock. In *Congested Districts' Board v. Mayo County Council* (2), a large number of men entered the applicant's plantation and cut down and carried away a considerable number of trees. The Judge of Assize found, as a fact, that the primary object of the persons who cut down the trees was to steal the timber. The Court of Appeal held that the compensation to which the applicants were entitled should be measured, not merely by the injury to the plantation, but by the value of the timber which had been removed. Then in *Kirby v. Kerry County Council* (3), where a number of persons burglariously entered a shop, tossed about and damaged a certain quantity of stock, and took away articles of considerable value for their own use and benefit, it was held by the Court of Appeal, purporting to follow *Tyler's case* (1) and the *Congested Districts' Board's case* (2), that the applicants were entitled to compensation in respect of the value of the goods stolen as well as for the damage to their premises and stock.

These cases came for review before the High Court of Appeal in *Leyburn v. Armagh County Council* (4). I think that the principles established by the judgments

(1) [1921] 2 I.R. 8.
(2) (1921) 55 I.L.T.R. 4.
(3) [1921] 2 I.R. 388.
(4) [1922] 2 I.R. 58.

in *Leyburn's case*, so far as they are relevant to the case now before this court, may be summarized as follows :—

(1) The foundation of a claim under the malicious injuries code must be damage or injury to property, as distinguished from its loss by theft ; larceny simpliciter is not a subject of compensation under the code. (2) When, however, damage or injury has been maliciously caused to property and goods are stolen as the natural and direct consequence of that malicious damage or injury, then in calculating the amount of compensation to be awarded, the value of the goods so stolen should be included as being part of the loss sustained by reason of the malicious damage (3). But the value of the goods so stolen can be included in the compensation only in cases where the theft was a natural and direct consequence of the malicious damage. Upon these principles the decision in *Tyler's case* (1) may be supported on the ground of the express finding in that case by the Judge of Assize that the loss of the stock in trade by larceny was an immediate result of the wrecking of the shop by the rioters and the scattering by them of the contents (per Andrews L.J. in *Leyburn's case* (2)). *Kirby's case* (3), on the other hand, must, in view of the criticisms passed upon it in the judgments in *Leyburn's case* (4), be taken to have been wrongly decided and may be regarded as overruled. As regards the *Congested Districts' Board's case* (5) (which on its facts is the case most nearly resembling the one now before this court), the inclusion in the compensation of the value of the timber removed could only be supported if the theft of the timber could be said to be a consequence of the cutting down of the trees. For my part I cannot see how such a conclusion could be justified upon the facts of that case. So to hold would be in my opinion, if I may quote the phrase used by O'Connor L.J. in his dissenting judgment in *Tyler's case* (6) and adopted by Dodd J. in *Leyburn's case* (7), " to confound sequence with consequence."

(1) [1921] 2 I.R. 8.
(2) [1922] 2 I.R. 58. 69.
(3) [1921] 2 I.R. 388.
(4) [1922] 2 I.R. 58.
(5) (1921) 55 I.L.T.R. 4.
(6) [1921] 2 I.R. 8, 32.
(7) [1922] 2 I.R. 58, 74.

Certainly the majority of the High Court of Appeal in *Leyburn's case* (1), appear to have considered that in the *Congested Districts' Board's case* (2) the value of the trees taken away ought not to have been included in the compensation. At page 64 Ross L.C. says: "In the case of *Congested Districts' Board v. Mayo "County Council* (2), I think damages were given on a "wrong principle. They might properly have been "given in respect of the injury to the wood by cutting "down the trees. I think the decision erroneous in "awarding compensation in respect of the value of the "trees taken away. We think that the decision in "*Tyler's case* (3) has been carried too far." At page 66 Molony C.J. also indicates his disapproval of the decision in the *Congested Districts' Board's case* (2). At page 67 Henry C.J. expresses his full concurrence in the Lord Chancellor's judgment. And I think that the whole tenor of Dodd J.'s judgment is inconsistent with approval of an award of compensation on the basis adopted in the *Congested Districts' Board's case* (2). In my opinion the treatment by the High Court of Appeal of the decision in *Congested Districts' Board's case* (2) provides firm and sound basis for fixing the amount of compensation to be awarded in the present case. So far as the evidence goes it is quite possible that the missing parts of the ploughs were simply taken away by the person or persons who took the ploughs to pieces and were not damaged or destroyed. If this is what occurred I cannot see how the theft of those parts could be said to have been consequential upon dismemberment of the ploughs. In such circumstances it would be absurd to attempt to link together the taking to pieces of the ploughs and the theft of the loose parts as cause and effect. To recur again to O'Connor L.J.'s phrase, we must not confound sequence with consequence.

I therefore hold that, in the present case, the applicant is not entitled to recover compensation for the value of the missing parts of the ploughs, but is

(1) [1922] 2 I.R. 58.
(2) (1921) 55 I.L.T.R. 4.
(3) [1921] 2 I.R. 8.

entitled to be compensated only for the damage caused by the actual taking to pieces of the machines.

Decree for £2 with corresponding costs.

Solicitor for the applicant : *P. & J. Boyle.*

Solicitors for the respondent : *Greer, Hamilton & Gailey.*

J. P.

REX v. EDWARD WIGHTMAN (1).

Criminal law—Practice—Recorded sentence.

A criminal court has an inherent power to record a sentence against a convicted prisoner and to bind him over on recognizance to attend for judgment on notice.

APPEAL against sentence.

The appellant was indicted before Porter L.J. at the Belfast City Commission for the larceny of a cheque, and for forgery of the same cheque. He pleaded guilty to both charges and the trial judge thereupon recorded a sentence of 12 months imprisonment and bound over the prisoner to keep the peace and be of good behaviour for two years and to attend for judgment on notice from the Crown Solicitor. Four months later the appellant was convicted at petty sessions of the larceny of a fountain pen and a fine of twenty shillings was imposed. A notice to attend at the Belfast City Commission was then served on the appellant. The appellant appeared at the Belfast City Commission before Black L.J., who held that he had no option but to put the recorded sentence of twelve months imprisonment into effect. The appellant now appealed against sentence.

Bready for the appellant. There is no authority either in the statutes or in the reports to justify recorded sentences, and they are not referred to in the text-books. Unless this form of punishment can be proved to be lawful the sentence is invalid and must be quashed.

Jones K.C., for the Crown. The practice of recorded sentences is not only of long standing, but it is beneficial in every respect. It eases the position of the prisoner, who knows in advance the penalty for the breach of his

(1) In the Court of Criminal Appeal before Andrews L.C.J. and Sheil J.; March 6, 31, 1950.

recognizance, and it assists the judge if the prisoner has to be brought up again. The fact that so few recorded sentences have to be put into effect is the best illustration of the value of the practice. There is no reason to distinguish the case in which a prisoner is bound over to come up for sentence from the case in which a sentence is recorded and the prisoner is to come up for judgment.

Cur. adv. vult.

ANDREWS L.C.J., delivered the following judgment of the court :—

This appeal raises a question of some importance in the administration of the criminal law in Northern Ireland upon which authority is hitherto lacking.

The appellant, Edward Wightman, was indicted before Porter L.J. at the Belfast City Commission on the 12th April, 1949, on the charge of the larceny of a cheque, the property of one Thomas E. Burns. On a separate bill he was also charged with forging the cheque for the sum of £40, drawn in favour of N. McAteer and signed T. E. Burns. To both charges he pleaded guilty. Restitution having been made in full, and evidence as to character having been given, the learned Lord Justice, after explaining the matter fully to the appellant, recorded a sentence of twelve calendar months with hard labour against him, and bound him over in his own recognizance in the sum of £10 conditioned that he would keep the peace and be of good behaviour towards all His Majesty's subjects for a period of two years from that date, and that he would attend for judgment on getting ten days' notice from the Crown Solicitor. The recognizance itself contained no reference to the recorded sentence ; but, immediately following the taking of it, the Deputy Clerk of the Crown and Peace, addressing the appellant, said : " Now do you understand that in case you break " the obligation of the bond which you have just " entered into the recorded sentence of twelve months' " imprisonment with hard labour will be put into operation ? Do you understand that ? " To this the appellant answered : " Yes."

Unfortunately the appellant did not take advantage of the leniency shown to him ; and on the 3rd September, 1949, at the Belfast Custody Court, he pleaded guilty to the larceny of a fountain pen, the property of Littlewoods (Mail Order) Stores Ltd., and was fined twenty shillings and one shilling costs.

Following this conviction a notice, dated the 25th November, 1949, and signed by the Crown Solicitor, was duly served upon the appellant requiring him to attend at the Belfast City Commission on the 17th January, 1950, to show cause why the said recognizance should not be estreated and the sum of £10 forfeited, and also to show cause why the said sentence of twelve calendar months recorded against him should not be put into operation.

On the 17th January, 1950, the appellant was put forward before Black L.J., the presiding judge of the Commission, pursuant to the terms of the said notice, when evidence was given by police witnesses in regard to the proceedings before Porter L.J. at the April Commission, and also in the Custody Court on the 3rd September. Thereupon, as appears from the short-hand notes, counsel for the Crown asked the learned judge to estreat the recognizance and to deal with the prisoner. In reply to the judge's further questions counsel made it clear that he asked that the recorded sentence of twelve months be put into effect. After expressing doubt in regard to the authority for and the effect of such a sentence, the learned judge observed to counsel : " Well, you see the effect of this. This " man steals a fountain pen and is sent to jail for " twelve months for that " ; and, finally, in imposing sentence the learned judge said : " Well, I have " apparently no option but to order that this twelve " months' sentence take effect ; and I will make that " order."

It is against this sentence that the present appeal is brought, the appellant, who at the time of serving his notice had no legal advice, relying in a lengthy statement solely on the ground that the sentence was " very severe." Having regard to the doubts expressed by the learned judge when imposing sentence we felt

it our duty to amend the notice by adding as a further ground of appeal that the recorded sentence was not authorised by law, and that it was accordingly invalid, void and of no effect.

There does not appear to be any reference in the English text-books on criminal law and practice to recorded sentences such as that imposed upon the prisoner in the present case ; and it is, we think, clear, both from such books and from the authoritative sources from which we have made enquiries, that the practice in England is merely to require the offender to enter into recognizances with or without sureties to keep the peace and to be of good behaviour for a specified period, and to come up for judgment if called upon within that period. This form of recognizance is known to have existed for upwards of a century, and perhaps much longer, and is regarded as part of the common law. The same practice of merely binding an offender to keep the peace and to come up for judgment has undoubtedly existed and still exists in Ireland ; but, together with it, there has also existed for a great number of years the practice of imposing recorded sentences to be put into operation in the event of a breach of the prisoner's recognizance. When, and by whom, such a sentence was first imposed cannot now be ascertained ; but the research which we have caused to be officially made has established beyond all doubt that such sentences, when deemed appropriate, were frequently imposed without their legality being challenged or questioned, by at least a considerable number of the judges of the old High Court of Justice in Ireland who were recognised authorities on criminal law and procedure, and several of whom, it may be added, had served as Law Officers of the Crown before their elevation to the Bench. Since the establishment of the High Court of Justice in Northern Ireland under the Government of Ireland Act, 1920, almost all the members of both the High Court and County Court judiciary have followed a practice which has been found salutary as exercising a deterrent effect on the prisoner, and at the same time providing, as it were, a form of insurance to the public against the continuance by

such prisoner of his criminal activities. The relatively small number of cases in which prisoners so bound by recognizance, and against whom sentences have been recorded, are brought before the court to receive judgment or sentence is the best evidence which could be afforded in support of the retention of the practice, unless, of course, it offends against some established principle of the common law. It is further a matter of considerable importance that such recorded sentences have also been frequently imposed by Circuit Judges and other members of the judiciary in Eire, including the Court of Criminal Appeal; and no question has ever been raised there as to the legality of the procedure, just as, until the present case, the issue has never been raised in Northern Ireland. Indeed, as I have already pointed out, it has only arisen now for our determination at the instance of the members of this court in deference to the doubts expressed by Black L.J.; and the appellant's real complaint is not against the sentence passed by Porter L.J., which went at the time unchallenged, but because, as a result of his own act, it was put into operation by Black L.J.

We are naturally much impressed by the long continued and uninterrupted practice of so many Irish judges who, prior to 1921, exercised jurisdiction over the whole of Ireland, and who since that date have exercised two distinct jurisdictions in Northern Ireland and Eire respectively. Whilst it is impossible for us in Northern Ireland to trace back the origin of the practice in the statute law, or to ascertain such origin in records which we do not possess, and whilst we are accordingly unable to assign to it an immemorial character, yet is the practice certain in itself and salutary in its operation. Further it conforms to all reasonable requirements in the administration of the criminal law. In such circumstances we are of opinion that the practice should be upheld, and that there must be assigned to it a legal origin in the inherent jurisdiction of the court. When, indeed, it is carefully considered, it is only a modification of the practice well recognised in England and Northern Ireland of binding over a convicted person under the

Common Law to come up for judgment if called upon : *R. v. Trefor David* (1). It presses in no respect more harshly upon a prisoner. Indeed, it should in our opinion be in the prisoner's case, as it informs him in advance of the penalty which he will have to suffer if he breaks the conditions of his recognizance. It is, in our opinion, also helpful to the court before which the case is brought for judgment ; as the judge before whom the prisoner first appears is in a much better position, after hearing the case tried, or, in the case of a prisoner who pleads guilty, after a perusal of the despositions, to determine the appropriate sentence.

In placing reliance upon what we have referred to as the inherent jurisdiction of the court we are merely acting on the analogy of the judgment of the Court of Criminal Appeal in *The King v. Spratling* (2), which established that, apart from the provisions of sections 6 (5) of the Probation of Offenders Act, 1907, Courts of Quarter Sessions had always had as part of their inherent jurisdiction power to order a convicted person to be bound over to come up for judgment when called upon. Pickford J. delivering the judgment of the court, said that it was not, and could not be, denied that that court had power to sentence the prisoner at the time he was convicted, and the court thought it equally clear that it had power to postpone sentence till a future day. It also had power to release him on bail on his own recognizances. To bind him over to appear for sentence when called upon is only to postpone sentence, and in the meantime release the prisoner on bail. This power, the learned judge continued, had constantly been acted upon, and the court saw no reason to doubt that it existed, and that the jurisdiction to pass sentence still remained in the court. " We must " not, however," he added, " be taken to decide that " the court can postpone sentence sine die against the " will of the prisoner " (3).

If the jurisdiction so established exists we see no reason why it should be impaired merely because, in lieu of entirely postponing sentence, the court indicates

(1) (1939) 27 Cr.App.R. 50.
(2) [1911] 1 K.B. 77.
(3) Ibid. at 81.

what the sentence should be, but stays its execution during good behaviour over a limited period of time. Whilst it is undoubtedly correct to say that a punishment should take place before a total dismission of the party, and should not be allowed to hang over a man's head when once he is discharged, for that would be a punishment *in futuro;* yet, this objection does not apply whilst he is still remaining in a state of punishment, which he, in fact, does whilst the recognizance for good behaviour continues in force; for there is no total dismission until the period of the recognizance has expired. In this connection we would refer to the opinion of Wilmot C.J. in *R. v. Wilkes* (1), cited by Lord Selborne L.C. in *Castro v. The Queen* (2). Except in cases of treason and murder, in which there is still a fixed penalty, namely, death, there is now a discretion as to punishment in cases of felony; and, accordingly, with the exception of the two felonies mentioned, the words of Chief Justice Wilmot would now appear to be applicable to all cases.

For these reasons we are of opinion that the sentence appealed against was lawfully imposed on the appellant; and, when it is remembered that the sentence represented the punishment for the crime of the larceny and forgery of the cheque and not for the crime of the stealing of the fountain pen, we are of opinion that we would not be acting in accordance with authority if we were to reduce the term of imprisonment which it imposed. We have no doubt that Porter L.J., in imposing only a recorded sentence and in giving the prisoner a further chance, was influenced by the restitution which had been made by or on behalf of the prisoner. The equity in favour of leniency which the prisoner obtained by such restitution was forfeited and lost to him by the subsequent offence which he committed and by the breach of recognizance which it involved.

For the foregoing reasons we dismiss the appeal, but, having regard to the unavoidable delay in hearing

(1) (1769) 19 State Tr. col. 1075, 1133-34.

(2) (1881) 6 App. Cas. 229, 237.

the appeal, we shall direct that the sentence shall run as from the 17th January, 1950, the day upon which Black L.J. put the sentence into operation.

Appeal dismissed.

Solicitor for the appellant : *J. J. Napier.*

Solicitor for the Crown : *Crown Solicitor for Belfast.*

J.P.

CLARK v. ULSTER BANK LTD. (1).

Banker—Solicitor customer—Two accounts—Clients' moneys account—Right of banker to set off debit on one account against credit on other account—Solicitors Act (Northern Ireland), 1938 (2 Geo. 6, c. 14), ss. 33, 34, 37.

A solicitor who had an account with a bank opened a second account for the purpose of banking clients' moneys but he did not state this purpose to the bank at the time the second account was opened. The bank claimed that it was entitled to set off the amount which the first account was in debit against the amount which the second account was in credit.

Held, (i) that in the absence of any agreement to the contrary a bank is entitled to combine a customer's accounts and set off the debit balance of those in debit against the amount standing to the credit of those in credit, unless it has notice that the sums standing to the credit of the customer are trust funds of which the customer has control in a fiduciary capacity;

(ii) that though the nature or number or magnitude of transactions passing through a particular account of a solicitor may afford notice to the bank that such account is an account of clients' moneys, this is a question of fact to be determined in each case, and the mere fact that a solicitor opens a second account does not of itself constitute such notice;

(iii) that s. 37 (2) of the Solicitors Act (Northern Ireland), 1938, which provides that a bank at which a solicitor keeps an account for clients' moneys shall not, in respect of any liability of the solicitor to the bank (not being a liability in connection with that account) have any right of set-off against moneys standing to the credit of that account, applies only to accounts which to the knowledge of the bank are clients' moneys accounts.

(iv) that when a bank acquires notice that one of the accounts kept by a customer is a trust account it may nevertheless exercise any right of set-off to which it may then be entitled having regard to the state of the accounts at the time of acquiring such notice.

If a customer has two accounts with a bank, one in credit and one in debit, the legal position in the ordinary case is not that there are two distinct debts, one owed by the banker and the other owed by the customer. Accounts are merely entries of transactions in books, and where a customer has several accounts with a banker the true position at any time as between banker and customer will only be found by deducting the aggregate of the customer's debit balances from the aggregate of his credit balances, or vice versa.

(1) In the Chancery Division before Black L.J., Dec. 15, 16, 17, 20, 1948; Jan. 13, 14; June 30, 1949.

ACTION tried before Black L.J.

The plaintiff was a solicitor practising in Strabane under the firm name of Elliott & Clark. The plaintiff entered into a partnership with another solicitor named Elliott in 1907, and on the formation of the partnership they opened an account in the firm's name with the defendant bank at the Strabane branch. When Elliott retired in 1934 the plaintiff carried on the practice and continued to keep the account with the defendant bank using it for all the general purposes of the practice.

In January, 1941, the plaintiff opened a second account with the defendant bank at the same branch. This new account was entitled "No. 2 Account," and although no special title was given in the Bank's books to the original account it will be referred to hereafter in this report as "No. 1 Account." From the time that the No. 2 Account was opened all moneys paid into and drawn out of that account were, apart from a few trifling exceptions, moneys received and paid on behalf of clients.

When the No. 2 Account was opened in January, 1941, the No. 1 Account was in debit with an overdraft limit fixed by the Bank of £5,000. Between January, 1941, and July, 1944, the No. 2 Account was always in credit but the debit on the No. 1 Account increased until it stood at £12,953. At that time the No. 2 Account stood in credit at the amount of £12,624 and the Bank pressed the plaintiff to transfer sums from No. 2 Account to No. 1 Account in order to reduce the indebtedness on the No. 1 Account. The plaintiff declared himself unable to make such transfer as the moneys in the No. 2 Account were mostly clients' moneys. The Bank thereupon suspended operations on both accounts.

The Bank maintained that it was entitled to set off the amount to which the No. 1 Account was in debit against the amount to which the No. 2 Account was in credit, whereas the plaintiff maintained that the No. 2 Account was an account for clients' moneys, and that the Bank was not entitled to have recourse to the amounts standing to the credit of No. 2 Account,

nor to set off the plaintiff's personal liability to the Bank on No. 1 Account against the credit balance of the No. 2 Account.

The plaintiff now brought this action. In his statement of claim he averred firstly that it was a term of the contract between himself and the Bank that the Bank would honour cheques drawn on No. 2 Account while it was in credit notwithstanding that No. 1 Account might be in debit ; secondly, that at all material times the Bank knew that the No. 2 Account was an account for clients' moneys and that accordingly the Bank was not entitled to set off the plaintiff's personal indebtedness to them on the No. 1 Account against the amounts standing to the credit of the No. 2 Account ; and thirdly, that the Bank was in law debarred from taking the action which they did by reason of the provisions of the Solicitors Act (Northern Ireland), 1938.

McCoy K.C., *Nicholson K.C.*, *McVeigh K.C.* and *Babington* for the plaintiff.

Patton K.C., *Hanna K.C.* and *Gibson* for the defendant Bank.

Cur. adv. vult.

Black L.J. [after referring to the facts of the case continued] : Apart from such alterations as may have been made in the law by the Solicitors Act (Northern Ireland), 1938, the position of banks in regard to such customers as solicitors, stockbrokers, auctioneers or estate agents, who might in the ordinary course of their business be expected to be handling substantial sums of money belonging to clients is not, I think, in any real doubt. In the absence of notice, express or implied, the banker is not concerned to question the customer's title to money paid in to the credit of his account, or to question his right to draw cheques upon that account. Such customers as solicitors or stockbrokers or auctioneers or estate agents will frequently keep only one account to the credit of which they lodge both moneys of their own and moneys received by

them on behalf of clients. The mere fact that the customer's profession or business is such that it necessarily involves his having moneys belonging to other people from time to time in his hands, does not affect the banker with notice that any specific sum or sums paid in by the customer are trust moneys, nor does knowledge on the banker's part that the customer's practice is to pay moneys received by him on behalf of clients into his bank account, constitute such notice or put the banker on inquiry. He is entitled to treat the money passing through the account as the customer's own (*Marten v. Rocke, Eyton & Co.* (1), *Thomson v. Clydesdale Bank Ltd.* (2).) A customer may choose to open two or more accounts with a bank. If he does so, then the banker, in the absence of any agreement to the contrary, whether express or to be implied from the course of business between them, is entitled to combine the accounts and to set off the debit balance on those in debit against the amount standing to the credit of those in credit. He will not, however, be entitled to take this course and to utilize, for the purpose of discharging the customer's liability on a debit account, the amount standing to the credit of an account in the customer's name which (whether from the title of the account or otherwise) the banker has notice is an account for trust funds of which the customer has control in a fiduciary capacity (*Ex parte Kingston. In re Gross* (3)). If there is no such notice, the circumstance that the moneys to the credit of such account are, in fact, held in a fiduciary capacity, will not affect the banker's right of set-off (*Union Bank of Australia v. Murray-Aynsley* (4).) And the fact that the customer who opens a No. 2 Account is a person through whose hands clients' moneys will ordinarily be passing, does not of itself amount to notice to the Bank that the No. 2 Account is an account of this type (*Greenwood Teale v. Williams, Brown & Co.* (5).)

The plaintiff's first contention is that it was a term of the contract between himself and the Bank that the

(1) (1885) 53 L.T. 946.
(2) [1893] A.C. 282.
(3) (1871) L.R. 6 Ch. 632.
(4) [1898] A.C. 693.
(5) [1894] 11 T.L.R. 56.

Bank would honour cheques drawn on No. 2 Account while it was in credit, notwithstanding that No. 1 Account might be in debit.

[His Lordship then examined the evidence relating to the circumstances in which the No. 2 Account was opened. He found that it was no term of the contract entered into on the opening of the No. 2 Account that the Bank would honour cheques drawn on the No. 2 Account notwithstanding that the No. 1 Account was in debit. He also found that though the plaintiff opened the No. 2 Account with the idea that it should be a clients' moneys account this was not communicated to the defendant Bank, and the defendant Bank was not informed that the No. 2 Account was a clients' moneys account until July, 1944. His Lordship then continued] :

In the absence of any evidence that the Bank were ever expressly informed that No. 2 Account was a clients' money account, the plaintiff says that, nevertheless, from the relative number and nature and magnitude of the transactions passing through the two accounts after the No. 2 Account was opened, it must have been sufficiently clear to the Bank officials that No. 2 Account was a clients' money account, and that it accordingly fell to be treated as a trust account, under the principle of *Ex parte Kingston. In re Gross* (1). There are, of course, obvious differences between the present case and *Ex parte Kingston* (1). In that case the account was an account kept by the treasurer of the county rates for the Police Fund. In the present case, the moneys paid into and drawn from the account, were the moneys of clients who varied from time to time, and from the manner in which, as I have described it, the account was kept it could be a matter of considerable difficulty to sort out how much of the amounts to the credit of the account at any particular time were the moneys of any particular client. And a further difficulty is introduced by the fact that some unknown part of the moneys carried to the credit of the account may be owing by the clients to Mr. Clark personally, though this circumstance by itself would not necessarily

(1) (1871) L.R. 6 Ch. 632, 639.

deprive the account of the character of a trust account (*Ex parte Kingston* per James L.J. (1).) One can see, however, that a plausible argument can be put forward that the nature and user of the account makes it resemble the account in *Thomson v. Clydesdale Bank Ltd.* (2) much more closely than the account in *Ex parte Kingston* (1). But I think that the most convenient course may be to lay aside these difficulties and address oneself to the main contention that the Bank officials must be taken to have known that the No. 2 Account was a clients' money account. The question really is whether the nature and number and magnitude of the transactions passing through the two accounts were such as would arouse in a reasonably intelligent bank official an appreciation that No. 2 Account was what has been called a clients' money account.

The phrase " clients' money account " as used during the case is, I think, derived from the English Solicitors Act of 1933 and the Northern Ireland Act of 1938. Although the Act of 1938 makes provisions in regard to clients' money accounts, no regulations have been made under the Act requiring solicitors to keep such accounts. From the evidence of Mr. Ellis, the Secretary of the defendant Bank, it would appear that a considerable proportion—perhaps the majority—of solicitors in Northern Ireland still keep only one bank account, and of those who keep two or more accounts, only a very small number designate one of those accounts as a " clients' account " or by some similar title. On the other hand it emerged during this case that there are some solicitors who find it convenient to keep several accounts. Dr. Corscadden, the Solicitor to the Bank, told us that the view taken by the law department of the Bank was that the regulations did not require the opening of a separate clients' money account, and that he was not aware of any circular sent out to managers regarding it. If the attention of the Bank officials at Strabane had been specifically directed to the question whether the No. 2 Account might not be, in fact, a

(1) (1871) L.R. 6 Ch. 632, 639.

(2) [1893] A.C. 282.

clients' money account, and if they had then gone through the transactions which had taken place through that account, and had contrasted them with the transactions through No. 1 Account—as indeed was done during the cross-examination of Mr. Kerr, the manager—I have no doubt that they might well have formed a suspicion, or perhaps more than a suspicion, that No. 2 Account was an account of the nature suggested. But I do not think that there was sufficient to arouse such a suspicion, or to put the Bank officials on inquiry. No doubt the Act of 1938 had been placed on the statute book, but in the absence of any regulations under the Act requiring solicitors to keep clients' money accounts, one would not expect bank officials—particularly in country branches—to be looking out for the opening of such accounts as a consequence of the passing of the Act. Nor would the question of clients' money accounts be as likely to be the subject of gossip in banking circles as it seems to have been in legal circles. Moreover, the No. 2 Account was not opened until two and a half years after the passing of the 1938 Act, and when it was opened, not only was it not described as a clients' money account, but according to the evidence of Mr. Kerr and Mr. Young, the cashier, which I accept, there was nothing at all said to suggest that it was to be a clients' money account. Probably the officials in a country branch would notice the cheques passing through a customer's account more closely than in a busy city branch. But in the absence of any express notice as to the special nature of No. 2 Account, the Bank officials were prima facie entitled to regard the manner in which Mr. Clark distributed his business between the two accounts as a matter depending on the internal organisation and routine of Mr. Clark's own office, and could scarcely be expected to be watching the individual transactions on the accounts so closely as to be able to infer what the system of distribution might be. I entirely accept Mr. Young's statement that he never understood on what system solicitors kept their accounts, and that how Mr. Clark was dividing the moneys between the two accounts

he did not know. And I also accept Mr. Kerr's statement that at no time from the 13th January, 1941, till his conversation with Mr. Clark, Junior, in July, 1944, did he know that No. 2 Account was alleged to be clients' money. It is, of course, largely a matter of one's own personal impression. But notwithstanding the differences between the transactions through No. 2 Account and those through No. 1 Account, which of course were brought out in sharp focus during the cross-examination of Mr. Kerr, I do not think that the mere fact of those differences would have been sufficient to bring to the notice of the Bank officials, in the ordinary course of banking business, that No. 2 Account was probably a clients' money account, unless there had been something else to direct their thoughts and attention to the specific point. And for my part, I cannot find anything in the case which I could say was sufficient to have this effect.

The third ground of the plaintiff's claim is that by reason of the provisions of section 37 (2) of the Solicitors Act (Northern Ireland), 1938, the Bank were precluded from setting off the debit balance on No. 1 Account against the credit balance on No. 2 Account. This sub-section provides that a bank at which a solicitor keeps an account for clients' moneys shall not, in respect of any liability of the solicitor to the bank (not being a liability in connection with that account) have any right of set-off against moneys standing to the credit of that account. And the sub-section is subject to a proviso that nothing contained in it is to deprive a bank of any right existing at the time when the first regulations made under section 33 of the Act came into operation.

This is a sub-section which gives rise to difficulty, and the proviso strikes one as being somewhat odd. It is difficult to see the relevance of the date when the first regulations made under section 33 come into operation in the possible event (as in fact happened) of those first regulations having nothing whatever to say about the keeping of Bank accounts. I think the explanation is that section 37 of the Northern Ireland Act is simply copied from section 8 of the English

Act of 1933, and that while section 33 of the Northern Ireland Act made it entirely optional for the Incorporated Law Society to make regulations regarding the keeping of clients' money accounts, section 1 of the English Act imposed upon the Council of the Law Society an imperative duty to make such rules. Neither of the Acts defines clients' money accounts or sets out their precise characteristics, but I think that the English Act was clearly drafted on the basis that the necessary rules under section 1 would be made as soon as might be after the Act came into operation, and that section 8 contemplated this state of affairs. As we know the English rules make express provision that every solicitor holding or receiving money on account of a client shall pay same into a bank account, in the title of which the word "Client" shall appear. There would, of course, be no difficulty in applying the provisions of section 8 (2) of the English Act to an account so entitled. Section 37 (2) of the Northern Ireland Act, as I have observed, simply copied section 8 (2) of the English Act, and we have to apply it as best we can to a situation where the circumstances contemplated by its prototype, namely, the existence of rules requiring the keeping of clients' money accounts, do not exist.

I have already held that the Bank was not aware that the No. 2 Account was an account for clients' moneys. But assuming that the account was, in fact, an account for clients' moneys within the meaning of section 37 (2) counsel on behalf of the plaintiff argued strongly that the effect of the sub-section is that the Bank cannot set off a balance owing to them by a solicitor on another account, against moneys standing to the credit of an account which the solicitor has in fact kept for clients' moneys, though the Bank were quite unaware that the account was being kept for that purpose. As Mr. Patton, however, emphasised, the object of sections 33 to 37 of the Act of 1938 was to put obligations on solicitors, not on banks. Section 37 was intended as a section for the protection of banks. Sub-section 1 of section 37 was designed to protect banks from being fixed with notice of the rights of

clients through the fact that money received on their behalf was being dealt with by a solicitor through a clients' money account. But sub-section 2 qualifies this protection by enacting that a bank cannot set off a solicitor's personal indebtedness against money standing to the credit of a clients' money account. I cannot think that the Legislature intended so far to alter the law as to preclude a banker from setting off a debit balance on one account against a credit balance on another account which he had never been informed was a clients' money account, which he had no reason to suspect was a clients' money account, and which (for the argument must logically go so far) the solicitor customer may even have expressly informed the banker was not a clients' money account at all. The opening of an account between banker and customer is a matter of contract. The opening of an account as a trust account is also a matter of contract. As Mellish L.J. says in *Ex parte Kingston* (1), "the banker need not open "such an account unless he pleases; when his customer "asks him to open it he is at liberty to decline." So, also, I think the opening or keeping of an account for clients' moneys is a matter of contract between the solicitor and his banker. The banker surely may, if he so wishes, decline to open or keep such an account. But in order that he may know that an account or an intended account is of this nature, he must be so informed. In my opinion, in imposing upon bankers by section 37 (2) a fetter in respect of clients' money accounts, the Legislature did not mean this fetter to apply to accounts which the customer alone might unilaterally, and without any notice to the bank, decide to keep as clients' money accounts, but meant it only to apply to accounts which, either by express arrangement between the customer and the bank, or else to the knowledge of the bank, were clients' money accounts. If I am correct in this view of the effect of section 37 (2) of the Act of 1938, it follows that what I have called the third ground of the plaintiff's claim must also fail.

(1) (1871) L.R. 6 Ch. 632, 640.

It only remains to deal with one point raised in Mr. McVeigh's closing argument on behalf of the plaintiff. Mr. McVeigh's contention was that the banker's right of set-off ceases to exist once he acquires knowledge that one of the accounts is a trust account. Accordingly it is said that even if it were held that the bank had no notice that No. 2 Account was a trust account until the 11th July, 1944, then inasmuch as they had not previously set off one account against the other, it was too late for them to do so after receiving notice of the fiduciary nature of the trust account. I think that this argument misapprehends the legal position. Where a customer for his convenience keeps several accounts at a bank, then in the absence of any special arrangement (whether express or to be implied from the course of business) precluding the banker from combining the accounts and of any notice to the banker that one of the accounts is a trust account, the true position at any time as between the banker and the customer will only be found by deducting the aggregate of the customer's debit balances from the aggregate of his credit balances or vice versa. The question of how much one owes the other is not affected by whether the customer has only one account or a number of accounts. Accounts are merely entries in a bank's books of transactions between the banker and his customers, and if a customer has a number of accounts with his bank, the position between them at any point of time can only be determined by putting together all his accounts. In truth, as James L.J. says in *In re European Bank* (1), "as between banker and customer, whatever number of accounts are kept in the books, the whole is really but one account." And see to the same effect *Bailey v. Finch* (2) per Blackburn J., and the discussion of this case by James L.J. in *Ex parte Morier* (3). In the case of *In re Morris, Coneys v. Morris* (4), decided by the High Court of Appeal in Ireland, Ross L.C. quotes with approval a passage from Hart's Law of Banking, in which it is

(1) (1872) L.R. 8 Ch. 41, 44.
(2) (1871) L.R. 7 Q.B. 34, 40.
(3) (1879) 12 Ch.D. 491, 498.
(4) [1922] 1 I.R. 136, 137.

said that quite apart from any question of lien, a banker is only bound to pay to or to the order of his customer the amount of the balance due to the latter after deducting what is due to the banker himself from the customer. Accordingly, the true position, at the time when it was first conveyed to the bank manager that the No. 2 Account was alleged to be a trust account, was not that there was a debt owing to Mr. Clark by the bank of the balance standing to the credit of the No. 2 Account, and a debt owing to the bank by Mr. Clark of the balance at debit of the No. 1 Account. The only debt owing by the one to the other was a sum amounting to the difference between these two balances. I am clearly of the opinion that the Bank were entitled to crystallise this position when they were informed that No. 2 Account was a trust account, and to hold themselves responsible to Mr. Clark only for the amount (if any) then due to him after deducting the balance at debit of No. 1 Account from the balance at credit of No. 2 Account. As a matter of fact it happened that the debit balance of No. 1 Account at that time slightly exceeded the credit balance of No. 2 Account. This view of the position appears to me not only sound in principle, but also consistent with what was said in *Roxburghe v. Cox* (1), and with *Murray-Aynsley's case* (2). The argument to the contrary, when examined, would appear to be based on the assumption that there was in existence something in the nature of a fund representing the balance at credit of No. 2 Account. Of course there was no such fund. The balance at credit of No. 2 Account was merely one of the elements to be taken into account in conjunction with the balance at debit of No. 1 Account in computing the indebtedness between Mr. Clark and the bank.

In the result I hold that the plaintiff's claim fails, and there must be judgment for the defendants in the action.

Judgment for defendants.

Solicitors for the plaintiff : *Wilson & Simms.*

Solicitors for the defendants : *L'Estrange & Brett.*

J. McC.

(1) (1881) 17 Ch.D. 520. (2) [1898] A.C. 693.

H. W. WEST LTD. v. McBLAIN (1).

Hire Purchase agreement—Contract for sale in breach of conditions—Subsequent exercise of option to purchase—Whether title thus obtained passes to purchaser under prior contract.

A contract for the hire purchase of a car provided that it should not be construed as a purchase or agreement to purchase and that the hirer should have no right to assign the contract without the written consent of the owners, but that if the hirer paid all instalments he should have the option to purchase the car for a nominal sum. Before all the instalments were paid the hirer purported to sell the car to the plaintiffs. Subsequently the hirer regained possession of the car and contracted to sell it to X, this last contract being entered into with the knowledge and oral consent of the owners. The hirer paid off the balance of the instalments with money found by X and then exercised his option to purchase. X let the car to the defendant under a hire purchase contract. In an action for damages for conversion,

Held, (i) that the purported sale to the plaintiffs was a nullity since the hirer had at that time no title or interest which he could assign, and that this defect was not cured when the hirer later paid off the balance of instalments and exercised his option to purchase, and accordingly the plaintiffs had no title to the car.

(ii) that the contract by the hirer to sell the car to X, being subject to the hirer obtaining a complete title from the owners, was a valid contract to sell after acquired property, and when the balance of instalments was paid and the option to purchase exercised a good title was acquired by X.

(iii) that even if X, through whom the defendant claimed, had no title the plaintiffs' action for conversion must fail since the defendant was in possession and the plaintiffs had failed to prove any right to possession.

ACTION for conversion tried before Sheil J.

The facts of the case sufficiently appear in the judgment.

Hanna K.C. and *McLoughlin* for the plaintiffs.

McVeigh K.C. and *Little* for the defendant.

Cur. adv. vult.

(1) In the King's Bench Division before Sheil J., June 12, 13, 16, 1950.

Sheil J. : On or about the 18th March, 1947, the British Wagon Company Limited entered into an agreement in writing with one William Watson, whereby the company, as owners, let on hire to the said William Watson, as hirer, a Morris Saloon car on certain conditions. Condition 8 provided that the agreement should not be or be construed to be a purchase or an agreement for the purchase of the car by the hirer, but that if the hirer should duly pay all sums due or payable to the owners, namely 15 monthly rents of £13 18*s.* 8*d.* (an initial rent of £95 having been paid on or before the delivery of the vehicle) the hirer should have the option to purchase the vehicle for the sum of ten shillings, and that unless and until the option should be exercised and the purchase price had been paid the vehicle should remain the absolute property of the owners. One of the conditions, 4 (*e*), provided that the hirer should not, without the previous consent in writing of the owners, assign the benefit of the agreement nor attempt to sell, underlet or otherwise part with the possession of the vehicle nor suffer the same to pass out of Great Britain or Northern Ireland nor make any alteration in the vehicle nor exhibit the same at any exhibition ; and condition 5 provided inter alia that if the hirer should not duly observe and perform the several provisions of the agreement it should be lawful for the owners to terminate the hiring, and the owner's consent to the hirer's possession should thereupon be deemed to be withdrawn and the owners should be at liberty to seize and take the vehicle.

On the 21st April, 1948, during the currency of the agreement the vehicle was made the subject of another hire purchase agreement expressed to be made between the plaintiffs, as owners, and Robert Watson, as hirer. This was a curious transaction : William Watson brought the car to the mart of one William T. Morrison for the purpose of having it sold. Morrison was unable to sell and William Watson brought his brother, Robert Watson, to the mart and Morrison brought the two of them to the plaintiffs. There Morrison as dealer purported to sell the car to the plaintiffs so that they might hire the vehicle on a hire purchase agree

ment to Robert Watson. In respect of this dealing William Watson received a sum of £300, of which £100 was paid to him directly by Robert Watson and £200 by the plaintiffs' cheque drawn in favour of Morrison and by him indorsed to William Watson. For his services Morrison received £10 from William Watson. I was invited by Mr. McVeigh for the defendants, as I understood him, to hold that all the parties concerned in this transaction were guilty of fraud. I am quite satisfied that William Watson was guilty of fraud, and it may well be that Robert Watson also was guilty of fraud but I have no evidence of that. Having heard and seen the witnesses Morrison and West, I am quite satisfied that there was not any fraud on the part of either of them. Morrison stated that he had absolutely no knowledge of any existing hire purchase agreement and I believe him. It is true that he represented himself to Harold W. West of the plaintiffs' firm as the owner but had it not been that the British Wagon Company's agreement was still in existence no one would have been damnified and it would have been a matter of no concern to the plaintiffs how the purchase money was disposed of so long as they had the ownership of the car and were paid the instalments. I am satisfied that the essence of the transaction as regards Morrison was that he got £10 as commission. All this is, however, rather beside the point as the decision cannot turn on that.

Robert Watson's payments under the agreement with the plaintiffs being in arrear the plaintiffs took proceedings against him. Their solicitor moved with dispatch, but it was found that not only was Robert Watson not in possession of the car but that William Watson had sold it to Messrs. W. H. Alexander Ltd., who in turn had hired it under a hire purchase agreement to the defendant. The date of that agreement is the 31st August, 1948. I should here add that W. H. Alexander Ltd., whose manager, James Gibson, had been informed by William Watson of the British Wagon Company's agreement, kept in touch with that Company at all stages of these negotiations with William Watson, and, as Mr. Gibson says, they bought the car with that Company's consent and actually furnished

the funds with which the Company's debt was paid off.

Those are the essential facts of the case, and the plaintiffs sue McBlain for trover and conversion of the car. Paragraph 3 of the Defence is as follows :—

" If the Plaintiff let on hire to Robert Watson " the said motor car as alleged (which is not admitted) " the Plaintiff was not at the date of the said hiring " or at any material date the true owner thereof nor " had the Plaintiff any authority right or title to " make the said hiring."

I have to decide whether the plaintiffs are or were at any material time the true owners of the car.

Several authorities and a good deal of argument were put before me. For the plaintiff it was submitted that : (*a*) William Watson was entitled under the British Wagon Co. agreement to transfer the property in the vehicle to the extent, at any rate, that he had an assignable interest in it ; and (*b*) even if he had an imperfect title his acts, as between him and the British Wagon Co., did not avoid the agreement and that when the British Wagon Co. was ultimately paid off the title of William Watson became perfect and enured to the benefit of the plaintiffs, or as Mr. Hanna put it " it went to feed the plaintiffs' title." For the defendant it was submitted that William Watson had repudiated the agreement in April, 1948, that William Watson had no interest or right which he could assign at that date, and that the entire transaction was void.

For the plaintiffs, *Whitehorn v. Davison* (1) was cited, but the decision there turned on the finding that the bailee did have a title in that ownership had passed to him, and that on two grounds, that by reason of the special nature of the contract there was a limited passing of the property and that there was conferred a power to pass the property giving the bailee a limited proprietary interest, and as Buckley L.J. said : " A man " may steal a chattel, but he cannot steal the power to " dispose of a chattel." (2). The other ground for the decision was that at some date subsequent to the bailment the plaintiffs had taken bills for the price of the goods and certainly then sold them. In that case the only parties concerned were the bailors, the bailee

(1) [1911] 1 K.B. 463. (2) Ibid. 479.

and an innocent pledgee from the latter.

Belsize Motor Supply Co. v. Cox (1) is, I must confess, a difficult case to understand. Channell J. held that a hirer under a hire purchase agreement, one of the conditions of which was that the hirer should not relet, sell or part with possession of a hired motor car in which event the owners could take possession and terminate the agreement, could pass some title to a pledgee. In *Whiteley Ltd. v. Hilt* (2), the King's Bench Division supported the decision on the ground that a distinction was to be drawn between a pledge and a sale while in the same case in the Court of Appeal no reference was made to the case on the point of title at all. In the judgment in the *Belsize case* (1), no reference is made to the condition against reletting, selling or parting with possession of the motor car. This is perhaps a pity, but in my respectful opinion that omission detracts from the value of a decision by which I am not, in any event, bound. I should add that Mr. McVeigh points out that the British Wagon Co. Agreement prohibited not only sale of the vehicle but also any assignment of the benefit of the agreement, the latter prohibition being absent in the *Belsize case* (1).

In *Whiteley v. Hilt* (3), the Court of Appeal reversing the King's Bench Division held that a transfer by a bailee under a hire purchase agreement was valid to transfer the interest of the bailee in the chattel there not having been any breach of the agreement at the date of the sale to the transferee. Further the facts of that case are far removed from these here because in that case there was a provision giving the hirer the right to resume the hiring should the owners retake the chattel under the terms of the agreement.

The defendants relied on *In the Matter of Rankin & Shiliday* (4). If that case is on all fours with the present case it is binding on me, as are the decisions in *McEntire v. Crossley Bros.* (5), and *Helby v. Matthews* (6). Though the form of proceedings was different in the *Rankin case* (4) from that here it seems

(1) [1914] 1 K.B. 244.
(2) [1918] 2 K.B. 115.
(3) [1918] 2 K.B. 808.
(4) [1927] N.I. 162.
(5) [1895] A.C. 457.
(6) [1895] A.C. 471.

to me that clause 3 of the agreement there and clause 8 in this case cannot be distinguished, and that the dicta of the Lords Justices and their citations from the two House of Lords cases are conclusive. William Watson had no title or interest which he could transfer to the plaintiffs ; he could not even assign the benefit of the agreement and his attempt to transfer the vehicle was a nullity and void. The submission that the subsequent payment off of the British Wagon Co. fed the title must fail since you cannot revivify that which never had life.

Mr. Hanna made the further point that since on the documents the Alexander agreement was entered into before the British Wagon Co. had been paid off, the respective dates being the 31st August, 1948, and the 7th September, 1948, Messrs. Alexander and the defendant claiming to derive title from them took no better interest than the plaintiffs. There are two answers to that argument. The sale to Alexanders was made subject to Watson obtaining complete title from the British Wagon Co. That is Mr. Gibson's evidence and I believe it. Secondly, even if that were not so and I were to hold that Alexanders and therefore the defendant were in no better plight than the plaintiffs, the defendant is in possession of the chattel and for the reasons already stated the plaintiffs have failed to prove their case.

It follows that there must be judgment for the defendant. While I regret the result I must add that I would also regret it if I had to give judgment for the plaintiffs, for I am satisfied beyond any possible doubt that the plaintiffs, Alexanders and the defendant, were all innocent parties. The defendant must have his costs.

Judgment for the defendant.

Solicitor for the plaintiffs : *B. McCloskey.*

Solicitors for the defendant : *Cooksey, McComb & Martin.*

J. P.

DOBLER v. WALSH (1).

Practice—Probate—Security for costs—Caveator—Conflict between Irish and English decisions—R. S. C. Or. 29, *r.* 1.

A defendant who voluntarily enters a caveat without previous citation becomes a party who according to the Irish practice may, and if the facts otherwise warrant it should, be ordered to give security for costs.

SUMMONS for an order for security for costs.

Emma Hetty Walsh, a widow, died on the 2nd April, 1949, having made a will four days previously by which she gave and bequeathed all her property to her daughter, the plaintiff, whom she appointed as sole executrix. The next-of-kin were her three children—the plaintiff, who had resided with her mother; the defendant, who had resided for upwards of twenty-five years in California; and a Mrs. Manley who lived in England.

In June, 1949, the defendant's solicitors entered a caveat on his behalf. This was duly warned and to such warning the defendant entered an appearance. The plaintiff now took out this summons under Order 29, rule 1, for an order that the defendant should give such security for costs as the court might think fit.

Little for the plaintiff. The court has jurisdiction in a proper case to order security for costs from a caveator outside the jurisdiction: *Lambert v. Bassett* (2); *In the Goods of Twomey* (3); *In the Goods of Flanagan* (4); *Ward v. Skeehan* (5). The special circumstances in the present case are that the defendant has been resident abroad for upwards of twenty-five years. He has no assets within the jurisdiction and his affidavit discloses no defence.

(1) In the King's Bench Division (Probate) before Andrews L.C.J.; May 5, 15, 1950.

(2) [1876] I.R. 11 Eq. 291.
(3) [1900] 2 I.R. 560.
(4) (1905) 39 I.L.T.R. 188.
(5) [1907] 2 I.R. 1.

Jones K.C. and *Babington* for the defendant. The English courts have not followed *Lambert v. Bassett* (1) : see *In re Emery* (2). A caveator is not the " actor " in the proceedings : *Moran v. Place* (3).

[ANDREWS L.C.J. : The English cases do not seem to draw the distinction between a cited defendant and a caveat defendant which is made in *Twomey's case* (4).]

The Irish cases emphasise that while the court may have jurisdiction to order security for costs, the making of such an order is entirely discretionary : *McNeany v. Maguire* (5) ; *Ward v. Skeehan* (6).

Cur. adv. vult.

ANDREWS L.C.J. : Emma Hetty Walsh, a widow, who resided at Finaghy, Belfast, died on the 2nd April, 1949. Four days before her death—on the 29th March—she made her last will, by which she gave and bequeathed all her property to her daughter, the plaintiff, and appointed her to be her sole executrix. The next-of-kin of the deceased were her three children—the plaintiff, who resided with her mother, the defendant, who has resided for upwards of twenty-five years in California, and a Mrs. Victoria Manley, whose home is in Blackpool. According to the affidavit of the plaintiff filed in support of this summons, the said will was prepared for the deceased by her neighbour and personal friend—one Robert Carruthers. For approximately one month prior to her death the deceased lady was attended by Dr. J. S. Matthews, who, it is alleged, has stated that on the relevant date she was fully capable of making her will. It is alleged by Mr. Carruthers that the instructions were given to him by the deceased, who knew and approved of the contents of the will, and that it was duly executed in the presence of a Mrs. Louise Hanna and of himself.

On the 1st June, 1949, the defendant's solicitors entered a caveat on his behalf. This was duly warned, and to such warning the defendant entered an appear-

(1) [1876] I.R. 11 Eq. 291.
(2) [1923] P. 184.
(3) [1896] P. 214.
(4) [1900] 2 I.R. 560.
(5) [1923] 2 I.R. 43.
(6) [1907] 2 I.R. 1.

ance. The writ of summons, in which the plaintiff claimed to be the executrix of the said will, was issued on her behalf on the 25th January, 1950. In the indorsement on the said writ it was, as is customary in a case such as this, stated that it was issued against the defendant because he had entered a caveat.

The present application, which is made under Order 29, rule 1, is brought by summons for an order that the defendant should give security for costs. Two points call for determination—the first of law, and the second of fact.

As regards the legal issue, the sole difficulty arises from a conflict of Irish cases with recent English authority. Our relevant rule (Order 29, rule 1) is as follows: "When a party shall require security for "costs from another party, he shall be at liberty to "apply for such security at any time by summons "grounded upon affidavit." It is a purely procedural rule; and it will be observed that it refers to the security for costs being required by a "party," not by a "defendant" as in the immediately succeeding rules. The word "party" is, of course, more comprehensive, and is in fact defined by section 3 of the Judicature Act (Ireland), 1877, as including "every "person served with a notice of, or attending any "proceeding, although not named on the Record." So also Order 91, rule 1, of the Rules of Court defines "party" as including "any person, body corporate, "or Council entitled to appear and be heard in relation "to any application or proceeding." Clearly, therefore, Order 29, rule 1, is sufficiently comprehensive in its terms to contemplate an application being made by a plaintiff against a defendant. At the same time it must be recognized that the general rule at common law has been that a defendant, who has been brought to the court by a plaintiff, should not be compelled to give security for costs. To hold otherwise might, in many cases, work a grave injustice, by, in effect, denying a defendant who had not invoked the jurisdiction, an opportunity of establishing his case owing to his lack of means.

However, as long ago as 1864, Sir J. P. Wilde, in the case of *Robson v. Robson* (1), in which the defendant appeared in answer to a citation advertised in newspapers, clearly entertained the view that this general rule of the common law might not apply in all cases in the Court of Probate, where the nominal position of plaintiff or defendant depends on the mode in which the cause commences. It is true that in that case the learned judge refused to make an order against the defendant because, as he said, in the suit before him the plaintiff was really the plaintiff, and the defendant was really the defendant brought into the court by the citation issued by the plaintiff.

The opinion thus expressed by Sir J. P. Wilde was the foundation for the decision of Warren J. in *Lambert v. Bassett* (2), in which it was ordered that the caveat of a defendant who had not been cited should be set aside, and all further contentious proceedings discontinued, unless security for costs be given. The ground of the application was that the defendant was an uncertified bankrupt. The learned judge relied upon *Robson v. Robson* (1) for the proposition that the general orders and the practice of the court show that a defendant who lodges a caveat is liable to be called on for security for costs in proper cases. He continued: "When a defendant is cited, the plaintiff is the person "who commences the litigation; but, when the "defendant has not been cited, but voluntarily lodges "a caveat, he, and not the plaintiff, initiates the "contentious proceedings." Accordingly, he held that there is no difference (see Corrigenda p. ix), in relation to giving security for costs, between the positions of caveator and of plaintiff.

This case, in its turn, was cited to Andrews J. in *Goods of Twomey deceased, O'Leary v. Stack* (3), which was argued on behalf of the plaintiff on Order 29, rule 4. This rule read, and indeed it still reads, that "a plaintiff ordinarily resident out of the jurisdiction "may be ordered to give security for costs though he

(1) (1864) 3 Sw. & Tr. 568.
(2) (1876) I.R. 11 Eq. 291.
(3) [1900] 2 I.R. 560.

" may be temporarily resident within the jurisdiction." The application for security against the defendant failed on the ground that the word " plaintiff " in that rule does not include a defendant caveator in a probate action. The case has, however, a material bearing on the present because of the words of Andrews J. : " In actions," he said, " other than probate actions " defendants are held entitled to defend themselves " without being required to give security for costs, " unless they are in substance plaintiffs ; but in the " present case if Mrs. Stack had continued to remain " resident abroad, as she is a caveator defendant, as " distinguished from a cited defendant in a probate " action, she could have been ordered to give security " for costs, if the case were one in which it would have " been proper to make such an order " (1).

A further relevant Irish authority is *In the Goods of Roger Flanagan, deceased* (2), in which the Court of Appeal directed security to be given on the special facts of the case by a caveator resident in England. Finally, two years later, in *Ward v. Skeehan* (3), it was held by Andrews J. that a next-of-kin caveator resident abroad may, in a proper case, be ordered to give security for costs. The judgment of the learned judge is relied upon by both parties to this summons. Mr. Little, on behalf of the plaintiff, relies on the passage (4) based on *In the Goods of Twomey* (5) and *Lambert v. Bassett* (6), that the rule as to security for costs in a probate action is not identical with that which prevails in Common Law actions ; for a defendant caveator may, in a proper case, be ordered to give security for costs. Mr. Jones, for the defendant, however, points out that the learned judge added that this cannot be required as a matter of right ; and that he could not regard the order for security for costs as being in every case *ex dubito justitiae*. Further, Mr. Jones pointed out that the judge, stating that a next-of-kin has a right to require an alleged will to be proved *per testes*, in fact refused the order sought.

(1) Ibid. 563.
(2) (1905) 39 I.L.T.R. 188.
(3) [1907] 2 I.R. 1.
(4) Ibid. 3.
(5) [1900] 2 I.R. 560.
(6) (1876) I.R. 11 Eq. 291.

With this consistent line of Irish authority in support of the court's jurisdiction to make an order for security for costs against a defendant caveator, we find that the current of judicial decision in England has recently been flowing in the opposite direction. I do not consider that the difference in the wording of the relevant English rule (Order 65, rule 6) sufficiently explains or accounts for the difference in judicial opinion ; for the English rule, like the Irish, is directed rather to procedure than to jurisdiction. At the same time, it is not to be wholly ignored that the English rule, which is somewhat differently phrased, does not contain the word " party "—a key word to the scope of our rule to which I have attached considerable importance in an earlier part of this judgment. The principal English authority relied upon by Mr. Jones is *In re Emery, Emery v. Emery* (1), in which Sir Henry Duke P. (as he then was) refused to make an order for security against a defendant caveator on the ground that a person who has lodged a caveat against probate of a will is not, though his action compels the executors to take proceedings, so much " the actor in the pro- " ceedings " as to be liable to give security for costs. The learned President, declining to follow *Lambert v. Bassett* (2), based his judgment largely upon the judgment of Lindley L.J., in *Moran v. Place* (3), a case which had no concern with security for costs, but which merely established that proceedings in a probate action were " instituted " within the meaning of section 2 of the Married Women's Property Act, 1893, by the issue of the writ by the plaintiff, and not by the entry of the caveat, or the appearance of the caveator in answer to the warning. The Lord Justice arrived at this conclusion because of the nature of a caveat, which was not a notice to any opponent in particular but to the registrar or officer of the court not to let anything be done by anybody in the matter of the will or the goods of the deceased without notice to the person who lodges the caveat. It is impossible, he said, to look at it as commencing any litigation. It was only

(1) [1923] P. 184.
(2) (1876) I.R. 11 Eq. 291.
(3) [1896] P. 214.

when the writ was issued that there was litigation. It is perfectly true, he added, that the person who entered the caveat caused the litigation, but she did not "institute" the proceeding by herself or anybody acting as her agent.

The decision of the Court of Appeal in *Moran v. Place* (1) was on a narrow issue, and, in my opinion, was of limited application. It amounted to no more than this—that a married woman, who was a defendant caveator, did not "institute" the probate action within the meaning of section 2 of the Married Women's Property Act, 1893. With all respect to the learned President I am of opinion that he unduly widened the scope of the decision in the application which he made of it in *In re Emery* (2). The question under English Order 65, rule 6, is not, as it appears to me, who "institutes" the action, or in the President's own language, borrowing the phrase of Lindley L.J., who is "the actor in the proceedings." At any rate, it suffices for my purpose that the decision is not an authority upon our rule, which is wide enough in its express terms to include any party. Accordingly, I adopt the law as laid down in the Irish cases to which I have referred, not only because I conceive this is the proper course for me to adopt as a judge of first instance when dealing with an old established practice, but also because, in my opinion, such law is correct. The defendant's voluntary entering of the caveat without previous citation makes him a party who, according to our practice, may, and if the facts otherwise warrant it, should be ordered to give security.

The only question which remains for consideration is whether the facts make this a proper case in which to make the order. It is with some little hesitation that on this issue I hold in favour of the defendant. I think the answer really depends upon whether the case is a proper and reasonable one for inquiry. If it is, the defendant should not be shut out from making it, which might be the result of making the order sought. A person who dies intestate has, in effect, a will made for him by statute which confers upon the

(1) [1896] P. 214. (2) [1923] P. 184.

next-of-kin a right to share in the distribution of the assets of the deceased. It is for this reason that a next-of-kin, whose rights would be affected by such will, is entitled, subject always to his opposition to the will being based on reasonable grounds, to require the will to be proved *per testes*. It is for the trial judge on all the facts of the case to say whether such proof should be carried out in whole or in part at the expense of the estate, or whether it should be borne by the next-of-kin, whose caveat has rendered necessary proceedings which were not justified by the facts. I am quite unable to say on the necessarily meagre statement of the facts before me on the summons into which category this case will ultimately fall; and the last thing which I should wish to do would be to say anything which might embarrass the trial judge in the exercise of his full and free discretion. But this I think I can and ought to say. This was a death-bed will of a lady of 78 years, made only four days before the death, by a neighbour who had no legal professional training or experience. The shaky handwriting of testatrix in her signature to the will probably reflects her weakened condition. The name of the defendant, her only son, does not appear in the will. The early requests which were made on his behalf for information in regard to the circumstances attending the making of the will were refused and the information withheld, though it is true that this failure of duty was subsequently remedied. It is such matters which naturally create doubts which, of course, may subsequently be proved to be wholly unfounded suspicions.

It may well be that at the trial it may be established that the will was duly executed by a competent testatrix, who knew and approved of its contents. That, however, is not the issue now before me. It suffices for me to say that the defendant, who is not mentioned in his mother's will, has presented a sufficient prima facie case for enquiry to entitle him—I repeat at his own risk—to ask for a judicial determination upon the validity of this will in our courts, without the necessity for his giving security for costs as a condition of his defence and of his presentation of his case to the judge or jury.

I accordingly make no rule on the summons, and I reserve the costs of the application for the trial judge, who, with the full facts before him, will be in a much better position to deal with them than I could possibly be (1).

No order.

Solicitors for the plaintiff : *George McCracken & Co.*
Solicitor for the defendant : *J. C. Taylor.*

S. M. M.

(1) [The judgment in this case has not been revised by the learned Lord Chief Justice.—EDITOR].

IN RE CORRY'S WILL TRUSTS. CORRY v. CORRY (1).

Marriage settlement—Construction—Covenant to settle property acquired during coverture "whether in possession, reversion or otherwise"—Property acquired subject to contingency—Vesting occurring after termination of coverture—Whether property caught by settlement.

A marriage settlement contained a covenant by the wife to bring into the settlement property acquired by will or gift from her father during coverture "whether in possession, reversion or "otherwise."

Held, that these words included property to which the wife became contingently entitled under her father's will but which did not vest until after coverture was determined.

ORIGINATING SUMMONS.

Mary Jane Latchford and Jeannie Pinkerton Stephens, daughters of Robert William Corry, by their respective marriage settlements covenanted to bring into the settlements any property acquired by will or gift from their father. The covenant in each settlement ran: "All property not hereinbefore settled to "which the said [daughter] shall at any time during "the now intended coverture become entitled, whether "in possession, reversion or otherwise by will or gift "from her father . . . shall . . . be assured and "transferred into or otherwise vested in the trustees, "etc."

By the terms of his will Robert William Corry left property to his two daughters subject to a life interest in favour of his niece and subject also to the conditions that the daughters be alive at his death and that his niece die without issue. Both these conditions were fulfilled, but in each case after the coverture of the daughter had determined. The question having arisen whether the chance of succeeding to the property which each daughter acquired under her father's will was an acquisition of property within the meaning of

(1) In the Chancery Division before Curran J.; May 3, 1950.

the clause in the settlements relating to after-acquired property this summons was taken out by the trustees of the will of Robert James Corry.

Reid for the plaintiffs. There is no decision as to the effect of a covenant describing the property by words of future acquisition only on property in which a contingent interest first accrues to the wife during coverture: Norton on Deeds, 2nd Ed. p. 665. As to the construction of the word "otherwise" one should consider whether it has to be construed *ejusdem generis* with the words "possession" and "reversion" which have the common characteristic of indicating vested interests: *Parkinson v. Dashwood* (1); *In re Bland's Settlement* (2). In every case regard must be had to the wording of the covenant: *Lloyd v. Prichard* (3); *In re Dowie's Will Trusts* (4). There is a line of cases in support of the argument of the trustees of these marriage settlements in which an interest has been held vested subject to being divested: *In re Ware* (5) *In re Jackson's Will* (6); *In re Mackenzie's Settlement* (7).

Nicholson K.C. for the trustees of the marriage settlements. In view of the fact that the source from which property contemplated by the covenant is to come is designated, the word "otherwise" must be given a wide meaning. The words "become entitled" mean "become entitled in interest." In this case the persons who were to benefit under the will were a designated class and accordingly were ascertained at the death of the testator. That is the difference between this case and those cases in which there was a mere *spes*: *In re Parsons* (8); *In re Cazenove* (9).

Gibson for the personal representatives of the daughters. It is clear that a *spes successionis* is not vested: *In re Simpson* (10). The decision in *Agar v. George* (11) would appear to be against me, but it shows

(1) (1861) 4 L.T. 41.
(2) [1905] 1 Ch. 4.
(3) [1908] 1 Ch. 265.
(4) [1949] Ch. 547.
(5) (1890) 45 Ch.D. 269.
(6) (1879) 13 Ch.D. 189.
(7) (1867) L.R. 2 Ch. 345.
(8) (1890) 45 Ch.D. 51.
(9) (1919) 122 L.T. 181.
(10) [1904] 1 Ch. 1.
(11) (1876) 2 Ch.D. 706.

that the intention of the particular covenant must be taken into account. The purpose of a marriage settlement is to protect the wife's property from the husband. Any property which does not fall in during coverture does not need to be protected. It has been contended that the word "otherwise" was inserted to give the clause its widest possible meaning, but it is more probable that its insertion was to cover interests in remainder.

Curran J.: In my opinion the marriage settlements in this case do capture the contingent interests. I think it is quite clear from the authorities that this case does not fall within the *spes* cases. That being so it is clear that there is an interest. Granting the existence of an interest it is also clear that a person may become entitled to that interest.

Having got to that stage, and turning to the clause in the marriage settlements, I have no difficulty in saying that the words "become entitled" can mean become entitled *inter alia* to contingent interests. It comes to this: whether or not there is anything in the wording of the clause which cuts down the expression "become entitled," so that any interests, and in particular contingent interests, are excluded.

Reading the clause "all property not hereinbefore "settled to which the said [daughter] shall at any time "during the now intended coverture become entitled "whether in possession, reversion or otherwise by will "or gift from her father . . . shall . . . be assured "and transferred into or otherwise vested in the "Trustees, etc." and giving the words their ordinary meaning, the use of the words "or otherwise" indicates an intention to extend rather than limit the scope of the clause. The intention would seem to be to ensure that any property to which a daughter should "become entitled by will or gift from her "father" should be brought in. The words appear to have been chosen to prevent the exclusion of any interest: "possession" indicating a present interest, "reversion" a future interest, and "otherwise" covering any interest not in possession or reversion. It has

been contended that " otherwise " should be construed *ejusdem generis* with " possession " and " reversion," and that being so that it must be construed as referring only to a vested interest. I find nothing in the clause to warrant such a limited construction. Accordingly, I hold that the contingent interests in question are captured by the clause.

Declaration accordingly.

Solicitors for the plaintiffs : *C. & J. Black.*

Solicitors for the trustees of the settlements : *Geo. McIldowie & Son.*

Solicitors for other defendants : *White, McMillan & Wheeler; John McKee & Son.*

S. M. M.

PROVINCIAL BUILDING SOCIETY v. BROWN AND MINISTRY OF FINANCE FOR NORTHERN IRELAND (1.)

Building Society—Land Purchase annuity—Whether "a prior "mortgage"—Building Societies Act, 1894 (57 & 58 *Vict., c.* 47), *s.* 13 (1).

A prior charge in the form of a land purchase annuity payable to the Ministry of Finance for Northern Ireland is not "a prior "mortgage" within the meaning of s. 13 (1) of the Building Societies Act, 1894.

ORIGINATING SUMMONS.

By an indenture dated the 9th July, 1949, and made between the defendant Brown and the plaintiff Society the defendant Brown as beneficial owner demised to the plaintiff Society the lands and premises registered and comprised in Folio No. 25672 of the Land Register of County Down, of which the defendant Brown was registered as owner in fee simple, to hold the same unto the plaintiff Society for the term of 9,000 years by way of mortgage to secure a loan of £2,500 advanced by the plaintiff Society to the defendant Brown. The registering authority accepted this indenture as an instrument of charge in pursuance of s. 40 (2) of the Local Registration of Title (Ireland) Act, 1891 ; and on the 29th July, 1949, the plaintiff Society was duly registered as owner of a charge on the said lands for the sum of £2,500. A certificate of charge dated the 11th October, 1949, was later issued to the plaintiff Society which contained inter alia a statement to the effect that the charge to which the certificate related was the second charge entered in the Folio and that the prior charge was an annuity of £20 10*s.* 0*d.* payable half yearly to the Ministry of Finance for Northern Ireland until an advance of £437 10*s.* 11*d.* had been repaid. On the Folio itself the annuity was shown as a "burden."

(1) In the Chancery Division before Curran J. ; Feb. 2, 3 ; July 31, 1950.

The question having arisen whether this prior charge was a " prior mortgage " within the meaning of s. 13 (1) of the Building Societies Act, 1894 (1), and whether the advance by the plaintiff Society to the defendant Brown had been made in contravention of that section this summons was taken out for the determination of these questions.

Nicholson K.C. and *O'Neill* for the plaintiff Society. A land purchase annuity is not, either in form or in fact, a first mortgage within s. 13 (1) of the Building Societies Act, 1894. It lacks these essential characteristics of a mortgage : (i) the granting of an estate by the mortgagor to the mortgagee to secure the loan, (ii) the right to redeem, and (iii) the right to foreclose. The tenant purchaser does not part with any estate. A mortgage is a conveyance of freehold or leasehold property to secure a sum of money and subject to an equity of redemption : *Cavendish v. Cavendish* (2) per Cotton L.J. The means by which the purchaser got the property from the Land Commission was different before 1887. By s. 4 of the Purchase of Land (Ireland) Act, 1885, property vested in the purchaser who then executed a deed in favour of the Land Commission. In form it was a mortgage and passed the estate. This section was repealed by s. 18 (2) of the Land Law (Ireland) Act, 1887, and from that time on the property is vested in the purchaser by means of a vesting order charging repayment of the annuity on the tenant purchaser's interest. S. 45 of the Irish Land Act, 1903, provides that every advance under the Land Purchase Acts shall be repaid by annuity and s. 46 gives power to redeem the annuity, not by payment of the original debt as in the case of a mortgage, but by the payment of an amount sufficient to purchase stock.

(1) Building Societies Act, 1894, s. 13 (1) : " A society under the Building Societies Acts shall not advance money on the security of any freehold, " copyhold, or leasehold estate " which is subject to a prior " mortgage, unless the prior " mortgage is in favour of the " society making the advance."

(2) (1885), 30 Ch.D. 227.

Patton K.C. for the Registrar of Building Societies. The object of s. 13 (1) of the Building Societies Act, 1894, is to prevent any building society lending on insufficient security and to ensure that it shall have all the powers of a first mortgagee. If the Act only contemplated mortgages in the strict sense it would not cover other charges such as those under the Land Transfer Act, 1897. In this case the Ministry of Finance is in the position of a first mortgagee : *Dolan v. Murphy* (1).

Gibson for the Ministry of Finance. The annuity has priority over all other estates, interests and encumbrances : s. 20 of the Land Law (Ireland) Act, 1887.

A land purchase annuity is neither a rent-charge nor a mortgage. It is a statutory imposition—the creature of statute and entirely *sui generis*. The history of the development of the land purchase annuity and its character can be traced by reference to the Landlord and Tenant (Ireland) Act, 1870, ss. 44, 49, 50 ; Landlord and Tenant (Ireland) Act, 1872, s. 1 (2), (3) ; Land Law (Ireland) Act, 1881, ss. 26 (2), 28, 30 ; Purchase of Land (Ireland) Act, 1885, s. 4 ; Land Law (Ireland) Act, 1887, s. 18 ; Land Law (Ireland) Act, 1896, ss. 26, 36 ; and the Irish Land Act, 1903, ss. 22, 54 (2).

McCall for the defendant Brown.

Cur. adv. vult.

CURRAN J. [stated the facts and continued] : The word " mortgage " is not defined in the Act. The only assistance given by the Legislature as to its intended meaning is to be found in section 13 of the Building Societies Act, 1874, which Act is, by section 29 of the 1894 Act, to be construed as one with that Act.

The relevant portions of section 13 of the 1874 Act are as follows : " Any number of persons may establish " a society under this Act, either terminating or

(1) [1930] I.R. 60.

" permanent, for the purpose of raising by the sub-
" scriptions of the members a stock or fund for making
" advances to members out of the funds of the society
" upon security of freehold, copyhold, or leasehold
" estate, by way of mortgage ; and any society under
" this Act shall, so far as is necessary for the said
" purpose, have power to hold land with the right of
" foreclosure . . . Provided always, that any land to
" which any such society may become absolutely
" entitled by foreclosure, or by surrender, or other
" extinguishment of the right of redemption, shall as
" soon afterwards as may be conveniently practicable
" be sold or converted into money."

I find nothing in this section to indicate that the Legislature intends to give to the word " mortgage " a meaning wider than its ordinary meaning. On the contrary, the references in the section to " foreclosure " and to the society becoming absolutely entitled to the land, tend to emphasise, in my view, that what is meant by " mortgage " is a mortgage ordinarily so called, in which an estate in the lands is transferred to the mortgagee to secure sums of money and subject to an equity of redemption.

In my opinion, however, that meaning is not limited, under the Building Societies Acts, to mortgages in which a legal estate is transferred to the mortgagee. Section 13 of the 1894 Act refers to a " mortgage " and a " prior mortgage " ; and recognises that a building society may advance money on the security of a second, or equitable mortgage, provided it has already got the prior mortgage. Accordingly, it would appear that an equitable mortgage, in which the equity of redemption is the estate which is transferred to the mortgagee, is a mortgage within the meaning of section 13 of the 1894 Act and section 13 of the 1874 Act. It may be that other forms of equitable mortgage are included, such as an agreement to create a legal mortgage or a mortgage by deposit of title deeds, in as much as either can result in the creation of a legal mortgage.

What I am concerned to consider, however, is, what is a " prior mortgage " within the meaning of

section 13 of the 1894 Act. In my opinion it is reasonably clear that such a mortgage must be a first mortgage under which the mortgagee gets the security of a legal estate whether it be by an immediate transfer of such estate or by an agreement to create a legal mortgage or by a deposit of title deeds or otherwise. The land purchase annuity in the present case is the first charge on the lands in Folio 25672 County Down which constitute the security for the Society's mortgage. If that first charge gives to the Ministry of Finance the security of the legal estate of the registered owner and leaves in such owner merely an equity of redemption, or equitable estate, that first charge, in my opinion, clearly constitutes a " prior mortgage " within the meaning of section 13 of the 1894 Act.

No doubt a " registered charge " is not a mortgage ordinarily so called. It must be borne in mind, however, that what the Society has got is a registered charge, yet it claims to have advanced money to the registered owner by way of mortgage. To establish that fact the Society must rely, not upon its registered charge as such but upon its instrument of charge, which is a mortgage deed. If a registered charge were a mortgage within the meaning of the Building Societies Acts the Society would find it difficult to establish that the registered charge of the Ministry of Finance is not a prior mortgage within the meaning of section 13 of the 1894 Act.

Just as the Society looks to its instrument of charge to establish its mortgage I must look behind the registered charge of the Ministry of Finance in order to ascertain whether the transaction that created such charge constitutes a " prior mortgage." If I am right in my opinion as to what that term means I must ascertain whether or not such charge was created by a transaction in which the Ministry of Finance advanced money to the registered owner on the security of his legal estate in the lands on Folio 25672 County Down.

Under section 4 (*c*) of the Purchase of Land (Ireland) Act, 1885, the repayment of advances to the Land Commission had to be secured by deed. The procedure

is illustrated by the case of *The Antrim County Land, Building, and Investment Company, Ltd. and John Houston v. John Stewart and William Stewart* (1). A reference to the facts set out in the headnote will suffice for the present purpose. It is stated therein that: "The defendants bought their farm from their "landlord, through the Land Commission, under the "Land Purchase Acts, in 1886, and by deed dated the "12th August, 1886, the lands were conveyed to them "in fee. By the same deed the defendants mortgaged "the lands to the Irish Land Commission as security "for the repayment of the purchase annuity." Under such procedure I have no doubt that a "prior mort-"gage" was created in respect of the repayment of the advance by the Land Commission.

Section 4 (*c*) of the 1885 Act was repealed by section 18 (2) of the Land Law (Ireland) Act, 1887, and under section 18 (1) of that Act it was provided as follows: "Every advance made by the Land Commission under "the Land Law (Ireland) Acts shall be secured by an "order of the Land Commission declaring the land "upon which such advance is made to be charged with "the repayment of the advance with interest in such "manner as the order may direct. In case any "interest or instalment mentioned on such order . . . "shall be in arrear for the space of forty days after the "time the same might be paid, it shall be lawful for "the Land Commission to exercise the powers of sale "and other powers conferred upon mortgagees by "Sections nineteen, twenty-one and twenty-two of the "Conveyancing and Law of Property Act, 1881, so "far as the same is applicable. . . ."

Under section 55 of the Irish Land Act, 1903, the lands are sold subject to the purchase annuity: by section 45 (1) of the same Act it is provided that every advance shall be repaid by a purchase annuity and under section 46 purchase annuities may be redeemed.

It will be noted that in providing this new procedure for securing the advance made by the Land Commission the Legislature is treating the purchase annuity as something in the nature of a rent charge and that it is

(1) [1904] 2 I.R. 357.

such rent charge that is vested in the Land Commission as security for the advance and not the legal estate of the purchaser.

In *In re Parkinson* (1) Madden J. described the position of the Land Commission in these words: "They are the owners of an incorporeal hereditament, "or rent-charge, issuing out of, and charged upon the "lands. They hold this rentcharge as security for "the payment of a mortgage debt."

The same learned judge in speaking of the registered owner of the land says this: "He never had the fee "out of which the rentcharge is carved. His estate "in fee and the purchase annuity were both created "by the exercise of statutory powers vested in the "Commission, operating upon the fee simple of the "lands" (2).

In *Inland Revenue Commissioners v. Cookman* (3) Palles C.B. says with reference to the registered owner: "Cookman never had any greater estate than "the fee subject to the annuity. The annuity appears "to have been a statutable reservation to the Crown, "and to be practically of the same character, during "its existence, as a Crown rent. It was, from its "creation, vested in a trustee for the Crown."

If Madden J. is right in his opinion that the Land Commission (now the Ministry of Finance) hold the rentcharge as security for the payment of a *mortgage debt* it follows that in addition to being rentchargeants they are mortgagees having the security of a legal estate or interest in the lands, namely a rentcharge. But whereas, under the earlier procedure of securing the advance by a mortgage the owner of the lands transferred his legal estate to the Land Commission, under this new procedure there are two separate legal estates or interests in the lands. The owner has the legal estate in fee simple subject to the rentcharge. If he mortgages that estate the mortgagee has the security of the mortgagor's legal estate in the lands or of such legal estate in those lands as may be transferred

(1) [1898] 1 I.R. 390, 398.
(2) Ibid. 400.
(3) [1915] 2 I.R. 149, 157.

by the mortgage deed. In my view in enacting section 13 of the Building Societies Act, 1894, the legislature did not intend to prohibit a society advancing money on the security of a legal estate. I am of opinion that were I to hold that the transaction creating the charge in favour of the Ministry of Finance constituted a prior mortgage within the meaning of that section, I would be legislating and not interpreting the clear words of the section.

I have not overlooked the point that the difficulties associated by the Legislature with the position of a second mortgagee may, at least to some extent, be associated with the position of the Society in the present case, having regard to the powers given to the Ministry of Finance in respect of the purchase annuity. I have in mind what is said by Lindley L.J. in *Portsea Island Building Society v. Barclay* (1) in dealing with a rule of the Society which prohibited lending money on the security of a second mortgage: "There is all the difference in the world between "taking a first mortgage and taking a second mortgage, "even if the second mortgage is a good security. "Quite apart from the value of the security, a second "mortgagee is always liable to be excessively em- "barrassed by the action taken by the first mortgagee, "even if the security is a good one. . . . One knows "perfectly well that prudent people are very slow to "lend money on second mortgage. There is good "sense in saying to a building society: 'You shall "'have nothing to do with second mortgages.' . . ."

I am not satisfied, however, that the similarity in the position of the Ministry of Finance and of a person having a "prior mortgage" within the meaning of section 13 of the 1894 Act requires or justifies an extension of the ordinary meaning of the term "prior "mortgage" as used in that section. One assumes, as Mr. Nicholson contended, that the Legislature understood the meaning of the word "mortgage" when it enacted the section and it is significant that it did not seek to extend its meaning, as it did in section 2 (vi) of the Conveyancing Act, 1881, by

(1) [1895] 2 Ch. 298, 303.

express definition, nor by including in the section other words that would be apt to describe the transaction that creates the charge in favour of the Ministry of Finance.

Declaration accordingly.

Solicitors for the plaintiff Society: *J. A. Leighton & Son.*

Solicitor for the defendant Brown: *D. H. Smyth.*

Solicitor for the Ministry of Finance: *F. C. MacNeice.*

Solicitor for the Registrar of Building Societies: *Chief Crown Solicitor.*

S. M. M.

BANGOR BOROUGH COUNCIL v. LENNON (1).

Highway—Street trading—Street Trading (Regulation) Act (Northern Ireland), 1929 (20 Geo. 5, c. 9), ss. 1, 9 (1)—Whether private street not maintained by local authority a "street" within the meaning of Act.

A private street not maintained by the local authority but over which there is a public right of way is a street within the meaning of sections 1 and 9 of the Street Trading (Regulation) Act (Northern Ireland), 1929.

CASE STATED by the County Court Judge of the County of Down.

The respondent was convicted at Bangor Petty Sessions on a summons charging him "that on the "9th day of July, 1949, in Queen's Parade, in the "Borough of Bangor, without a licence from the "complainant he did sell, or expose or offer for sale, "fruit from or upon a vehicle, barrow, cart, stall or "other receptacle occupying a stationary position at "a place in the carriageway or footway of said street "contrary to the provisions of section 9 of the Street "Trading (Regulation) Act (Northern Ireland), 1929," and was fined twenty shillings. On appeal to the County Court Judge of the County of Down this decision was reversed, but the county court judge stated this case for the Supreme Court.

The county court judge found the following facts:

On the 9th July, 1949, the respondent sold or exposed for sale his merchandise on Queen's Parade, which is a private street over which there is a public right of way and which is maintained at the expense of the abutting owners under s. 28 of the Public Health (Ireland) Act, 1878. The respondent had not obtained a licence from the appellants authorising him to trade at that place, but he had obtained permission from the owner of that part of Queen's Parade upon which he was trading.

(1) In the Court of Appeal before Andrews L.C.J. and Porter and Black L.JJ.; February 15, 27; March 30, 1950.

Lowry for the appellant council. The question of law is whether in the 1929 Act the word " street " means not only a street maintainable by the local authority but also a street which is maintained at the expense of the owner or owners thereof. Two things must be considered : (*a*) what is the plain and ordinary meaning of the word, and (*b*) whether there is anything in the Act to restrict that meaning : *Vestry of St. John, Hampstead v. Cotton* (1), *Midland Railway Co. v. Watton* (2).

In *The King* (*Small*) *v. Black* (3), Babington L.J. stated that " the Act was passed to regulate street " trading." It is submitted that the mischief sought to be remedied and the trading to be controlled is the same on a private as on a public street.

The effect of the interpretation clause in s. 1 (3) which says : " the expression ' street ' includes any " public place, square, or bridge which is maintained " by the local authority " is not to prevent the word receiving its ordinary meaning but to extend the ordinary meaning : *Robinson v. Barton-Eccles Local Board* (4) ; *Vestry of St. Mary, Islington v. Barrett* (5).

The interpretation clause refers to " any public " place." In *White v. Cubitt* (6) a piece of ground which was private property was held to be a " public " street, road or place." The language in the Act is clear and there is no valid reason to limit the meaning of the word " street."

McGonigal for the respondent. In *Vestry of St. Mary, Newington v. Jacobs* (7), Mellor J. said : " The " owner, who dedicates to public use as a highway a " portion of his land, parts with no other right than a " right of passage to the public over the land so " dedicated, and may exercise all other rights not " inconsistent therewith." A statute cannot take away such a right without express words.

(1) (1886) 12 App. Cas. 1, 6-7.
(2) (1886) 17 Q.B.D. 30.
(3) [1940] N.I. 70, 74.
(4) (1883) 8 App. Cas. 798, 801.
(5) (1874) L.R. 9 Q.B. 278, 283.
(6) [1930] 1 K.B. 443,,449-50
(7) (1871) L.R. 7 Q.B. 47, 53.

This is a question of rights as between landowners and local authorities in general. There might be a most valuable right. The intention to take away a right must be expressed in unequivocal terms : *Central Control Board v. Cannon Brewery Co., Ltd.* (1).; *Att.-Gen. v. Horner* (2). The interpretation section expressly restricts the operation of the Act to " any place, square " or bridge which is maintained by the local authority." There is no provision for a " private " street, square or bridge.

Cur. adv. vult.

The following judgment of the court was delivered by BLACK L. J. :

This matter comes before the court upon a case stated by the County Court Judge of Down at the instance of the Borough Council of Bangor who were the complainants in a summons brought against the respondent alleging the commission by him of an offence under section 9 (1) of the Street Trading (Regulation) Act (Northern Ireland), 1929, which we shall refer to in this judgment as " the Act." The question raised by the case stated is whether the word " street " as used in sections 1 and 9 of the Act includes a street over which there is a public right of way but which is maintained by the owners of the property abutting on the street and not by the local authority.

By section 1 (1) of the Act it is enacted that it shall not be lawful for any person to sell or expose or offer for sale any article or thing from or upon any vehicle barrow cart stall or other receptacle occupying a stationary position at a place in the carriageway or footway of any street in an urban district (other than a county borough) without a licence from the council of the district authorising him to do so. And section 9 (1) of the Act provides that every person who, or whose assistant, without a licence under the Act authorising him so to do, sells or exposes or offers for sale any article or thing from or upon any vehicle barrow cart stall or other receptacle occupying a stationary

(1) [1919] A.C. 744. (2) [1913] 2 Ch. 140.

position at a place in the carriageway or footway of any street in the district shall be liable on summary conviction to a penalty not exceeding five pounds and to a daily penalty not exceeding forty shillings for each day on which such offence is continued after conviction therefor.

The respondent having been convicted by a resident magistrate of an offence charged against him under section 9 (1) of the Act appealed to Quarter Sessions and the appeal came on for hearing before the County Court Judge of the County of Down at Downpatrick Quarter Sessions on the 27th October, 1949.

On the hearing of the appeal the following facts were proved or admitted :—

(*a*) On the 9th July, 1949, the respondent sold and exposed and offered for sale fruit from or upon a vehicle barrow cart stall or other receptacle occupying a stationary position at a place in the carriageway or footway of Queen's Parade within the Borough of Bangor.

(*b*) The respondent did not hold a licence from the Borough Council under the Act authorising him so to trade at the place aforesaid.

(*c*) The part of Queen's Parade in which the respondent was trading as aforesaid is a private street over which there is a public right of way. It is not, however, maintained at the expense of the Borough Council but has been made up and is maintained at the expense of the abutting owners under section 28 of the Public Health (Ireland) Act, 1878.

(*d*) The respondent had the permission of the owner of that part of Queen's Parade upon which he was trading as aforesaid there to sell expose and offer for sale goods as aforesaid.

It was contended on behalf of the respondent that the definition contained in section 1 (3) of the Act (to which we shall refer presently) showed that the word "street" as used in the Act should be confined to streets which are maintained at the expense of the local authority. The county court judge accepted this contention and accordingly held that on the facts

proved or admitted no offence against the Act had been committed by the respondent. He consequently ordered that the conviction be reversed and awarded the respondent costs against the council.

The council being dissatisfied with the county court judge's determination as being erroneous in point of law applied pursuant to the provisions of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935, to have a case stated for the opinion of the Supreme Court, and the matter now comes before this court upon the case stated by the learned county court judge in which he sets out the proved or admitted facts as aforesaid.

The provision of the Act of 1929 upon which the respondent bases his contention that the word " street " as used in the Act should be confined to streets which are maintained by the local authority is section 1 (3) of the Act. That subsection reads :

" For the purposes of this Act, the expression " ' street ' includes any public place, square, or " bridge which is maintained by the local authority."

It is admitted that the part of Queen's Parade on which the alleged offence was committed is a street in the ordinary meaning of that term. But it is argued on behalf of the respondent that the wording of section 1 (3) shows that the word " street " as used in the Act should not be read in the ordinary wide meaning of the term but should take colour from the type of public places squares and bridges which are included in the definition and so should be regarded as referring only to such streets as are (like the public places squares and bridges mentioned in the subsection) maintained by the local authority. It is, moreover, contended that not only does the wording of section 1 (3) point to this narrower meaning of the word " street " rather than to the wider meaning sought to be attached to it by the council but that this construction is supported by the consideration that the Act is a penal one and must therefore be construed strictly. And in further support of this view it is urged that a construction of the Act which would make it apply to streets maintained by the owners would

involve an interference by the council with the free user by individuals of their own property without any provision whatever for compensation, a construction which, on the authority of such well-known cases as *Central Control Board v. Cannon Brewery Co. Ltd.* (1), it is said that the court must if possible endeavour to avoid.

The point at issue between the parties is as to the effect of section 1 (3) of the Act upon the meaning of the word " street " as used in section 1 (1) and section 9 (1). There is no canon of construction more firmly established than that words used in a statute are prima facie to be construed in their ordinary and popular meaning. It is scarcely to be doubted that according to its natural and ordinary significance the word " street " means any and every street (see per Lord Watson in *Vestry of St. John, Hampstead v. Cotton* (2). Some provision, however, in the statute may show that the ordinary meaning of a word is either to be enlarged or to be cut down. As we have seen the respondent contends that the effect of section 1 (3) is to cut down and restrict the meaning of the word " street " when used in the Act so that it will bear a meaning narrower than its natural and ordinary meaning. We cannot agree with this contention. The operative word in section 1 (3) is the word " includes." It is settled by a long current of authority that the word " includes " when used in an interpretation clause such as section 1 (3) is ordinarily a word of extension. Save in very exceptional cases its effect is to make the word defined extend to things to which it would not otherwise be applicable, while preserving its applicability to things to which it would apply in its ordinary natural meaning. Its operation is normally an enlarging one and not a restricting one. As authority for this proposition it will be sufficient for us to refer to the frequently quoted passage from the judgment of Lord Selborne C. in *Robinson v. Barton-Eccles Local Board* (3), where, discussing an interpretation clause commencing with the words " Street " includes," the Lord Chancellor said: " An inter-

(1) [1919] A.C. 744.
(2) (1886) 12 App. Cas. 1, 7.
(3) (1883) 8 App. Cas. 798, 801.

" pretation clause of this kind is not meant to prevent " the word receiving its ordinary, popular, and natural " sense whenever that would be properly applicable; " but to enable the word as used in the Act, when there " is nothing in the context or the subject matter to the " contrary, to be applied to some things to which it " would not ordinarily be applicable."

No doubt, as was pointed out by Lord Watson delivering the opinion of the Privy Council in *Dilworth v. Commissioner of Stamps* (1), the context of a statute in some particular case may show that the word " include " was not merely employed for the purpose of adding to the natural significance of the word defined but was really equivalent to " mean and " include." In such case it would be meant to supply an exhaustive definition of the word defined and its effect would be to restrict the meaning of that word to the subject matters which it was defined to include and to these alone.

We are satisfied, however, that section 1 (3) of the Act of 1929 is not one of those exceptional instances referred to by Lord Watson. We find nothing in the context of the Act to support the suggestion that section 1 (3) should be regarded as giving a restricted meaning to the word " street." On the contrary we think that the phrasing of section 1 (1) and section 9 (1) of the Act point to the conclusion that the Legislature intended the Act to be applicable to streets in no narrow or restricted sense. Section 1 (1) enacts that it shall not be lawful without a licence from the council to sell from a vehicle occupying a stationary position at a place in the carriageway or footway of *any* street in an urban district and section 9 (1) provides that every person who so sells without such a licence from a vehicle occupying a stationary position in the carriageway or footway of *any* street in the district shall be liable to a penalty. As was said by Eve J. in *Clarke-Jervoise v. Scutt* (2), " any " is a word with a very wide meaning and prima facie the use of it excludes limitation. We think Mr. Lowry was justified in suggesting that if the Legislature had intended to limit the

(1) [1899] A.C. 99, 106. (2) [1920] 1 Ch. 382, 388.

operation of the Act to streets which were maintained by the local authority it would have been easy for them to make this clear by the insertion of a few appropriate words, whereas so far from doing so they chose to qualify the word "street" in section 1 (1) and section 9 (1) by an adjective importing wide generality.

With regard to the respondent's contention that the application of the Act to streets not maintained by the local authority would involve an interference with the free use by individuals of their own property we do not think that on examination this argument will be found to carry much weight. Mr. McGonigal, when pressed to indicate what particular interference with private property would take place by the application of the Act to the portion of Queen's Parade under discussion in the present case, was only able to suggest that the owners of the houses abutting on the street were entitled by reason of their ownership of portions of the street to erect stalls on those portions for the sale of goods or to licence other persons to erect such stalls. But it is expressly set out in the case stated that there is a public right of way over this portion of Queen's Parade. Where there is a public right of way over a street the public are prima facie entitled to use the whole width of the street for passing and repassing and it is an unlawful act to place anything on the street which obstructs this right of the public unless in the exceptional case (of which the present is not alleged to be an instance) where the street was originally dedicated subject to a right to obstruct it in some particular manner. Apart however from such cases where the original dedication was subject to some right to obstruct, it is clearly unlawful for anyone to maintain an obstruction in a street over which the public have a right of way. As was pointed out by Farwell J. in *Attorney-General v. Wilcox* (1), the illegality is the same even though the person responsible for the obstruction is the owner of the soil of the street. In this respect the owner of the soil has no higher right than a mere trespasser. We therefore find it difficult

(1) [1938] Ch. 934.

to see what real interference with private rights of property can be alleged by reason of the application of the Act to the portion of Queen's Parade which happens to be maintained by the adjoining owners. We certainly can discover no such interference as would lead us to strive to override the natural and ordinary meaning of the plain words of the Act.

It only remains to refer to Mr. McGonigal's other argument based on the fact that the Act of 1929 is a statute imposing penalties. Such statutes no doubt must be construed strictly. Still, as pointed out in the opinion of the Privy Council in *Dyke v. Elliott* (1), where the thing charged as an offence is brought within the words and within the spirit of a statute, there a penal enactment is to be construed, like any other instrument, according to the fair commonsense meaning of the language used, and the court is not to find or make any doubt or ambiguity in the language of a penal statute where such doubt or ambiguity would clearly not be found or made in the same language in any other instrument. In our opinion the wording of the Act of 1929 is too clear to create any real doubt or ambiguity as to its applicability to the portion of Queen's Parade to which the case stated relates.

In the result we shall answer the question submitted in the case stated by declaring that the portion of Queen's Parade referred to in the case is a street within the meaning of the Street Trading (Regulation) Act (Northern Ireland), 1929, although it is maintained at the expense of the owners thereof. We shall accordingly discharge the decision of the learned county court judge and shall remit the matter to him to proceed in accordance with the foregoing declaration.

Appeal allowed.

Solicitors for appellant: *John McKee & Son.*
Solicitors for respondent: *Geo. Martin & Co.*

S. M. M.

(1) (1872) L.R. 4 P.C. 184, 191.

LYONS v. LYONS (CARNE INTERVENING) (1).

Divorce—Adultery—Onus of proof—Matrimonial Causes Act (Northern Ireland), 1939 (2 & 3 *Geo.* 6, *c.* 13), *s.* 5 (2).

The standard of proof required of a petitioner who alleges adultery is more stringent than that required of a plaintiff in other civil actions which may be determined on a mere balance of probability, but less stringent than the standard of proof "beyond "reasonable doubt" which is required in criminal cases. The standard required may be stated as follows, "that the circumstances "must be such as would lead the guarded discretion of a reasonable "and just man to the conclusion."

Semble that the same standard is applicable in cases of matrimonial offences other than adultery.

Ginesi v. Ginesi, [1948], P. 179, and *Churchman v. Churchman*, [1945], P. 44, not followed.

PETITION for divorce by a wife on the ground of the adultery of the husband, the woman named intervening.

The facts are not set out as the case is reported only on the question of the standard of proof required in matrimonial cases.

Lowry for the petitioner.

McSparran K.C. and *McGonigal* for the respondent.

Stewart K.C. for the intervener.

Cur. adv. vult.

ANDREWS L.C.J. [first stated the issues raised in the pleadings and then continued]: I shall deal first with the legal issue raised which relates to the standard of proof required of a petitioner who alleges adultery. It must at once be admitted that the law is by no means in a satisfactory state, and it calls for either early and authoritative pronouncement by the House of Lords, or for such legislative reform, either of an amending or declaratory nature, as will remove the

(1) In the King's Bench Division (Matrimonial) before Andrews L.C.J.; July 4, 5, 6, 10, 13, 31, 1950.

ambiguities which have arisen from conflicting judicial opinions, and so clarify a situation, the continued retention of which would not be to the credit or advantage of legal administration. Support could be found on this issue of standard of proof for views as divergent as, on the one hand, the mere weight or preponderance of evidence, or, on the other hand, moral certainty, that is, proof beyond all reasonable doubt. A very informative article, dealing with both the historical aspect of the matter and the relevant authority, will be found in the Law Quarterly Review for the year 1949 at page 220. I think it may fairly be said that the recent cases in which the rigor of proof has been most strongly enunciated and relied upon have been *Churchman v. Churchman* (1) and *Ginesi v. Ginesi* (2). In the former case Lord Merriman P. was dealing with the issue of connivance in adultery when he made the pronouncement in general terms that "the same strict proof is required in the case of a "matrimonial offence as is required in connexion "with criminal offences properly so called." (1). This dictum was adopted as applicable to adultery by Hodson J. when giving judgment as a member of the Divisional Court in *Ginesi v. Ginesi* (3) where he said: "It might be desirable if I were to say at once what "I mean by the standards of proof in this class of case. "It is a matter of history that in matrimonial cases, "adultery having been described as a quasi-criminal "offence, the standard of proof is a high one, and "if authority be required it is to be found in the "language used by Lord Merriman P. in *Churchman* "*v. Churchman*" (1). The learned judge then cited the passage from the judgment of Lord Merriman to which I have referred. In the Court of Appeal, Tucker L.J., after setting forth this passage in his judgment, adds the significant words: "Counsel for "the husband does not dispute that that is an accurate "statement of the requirements of proof of adultery "in divorce proceedings" (4). Wrottesley L.J. also adopted Lord Merriman's dictum as applicable to

(1) [1945] P. 44, 51.
(2) (1947) 63 T.L.R. 545; [1948] P. 179.
(3) (1947) 63 T.L.R. 545, 546.
(4) [1948] P. at 180.

cases of adultery ; but he expressly reserved to " other " occasions " the decision whether it is equally applicable to other matrimonial offences (1).

It is, indeed, to be regretted that in neither of these cases—*Churchman v. Churchman* (2) and *Ginesi v. Ginesi* (3)—was the attention of the Court called to the decision of the House of Lords in *Mordaunt v. Moncreiffe* (4), in which the noble Lords (after consultation with the judges) held that a suit for divorce is a civil and not a criminal matter, and that the analogies and precedents of criminal law have no authority in the Divorce Courts.

It is not wholly to be wondered at that in such circumstances the High Court of Australia in *Wright v. Wright* (5) expressed its disapproval of *Ginesi v. Ginesi* (3), holding that in a charge of adultery the criminal standard of proof was not appropriate. Still less is it to be wondered at that in *Davis v. Davis* (6), the English Court of Appeal, reversing the judgment of Barnard J., unanimously declined to apply Lord Merriman's standard of criminal proof to a case of cruelty. Denning L.J. was a party to that decision as he had been to the earlier case of *Miller v. The Minister of Pensions* (7), and to the subsequent and, I believe, most recent case of *Gower v. Gower* (8). In the former of these cases the learned Lord Justice defined clearly the difference between the standard of proof required in criminal cases and that required in civil cases—a class which, as I have pointed out, is regarded by the House of Lords as including a suit for divorce. In the latter case the Lord Justice sets out five reasons, to most of which I have already referred, why *Ginesi v. Ginesi* (3) might advantageously be reconsidered by the Court of Appeal, and, I would add, perhaps by the House of Lords.

I shall conclude my observations upon this legal issue by referring to section 5 (2) of the Matrimonial

(1) Ibid. 186.
(2) [1945] P. 44.
(3) [1948] P. 179.
(4) (1874) L.R. 2 H.L. (Sc. & Div.), 374.
(5) (1948) 77 C.L.R., Pt. II, 191.
(6) [1950] P. 125.
(7) (1947) 63 T.L.R. 474.
(8) [1950] 1 All E.R. 804

Causes Act (Northern Ireland), 1939, which contains the only statutory provision—admittedly expressed in very general terms—in regard to the Court's duty in relation to standard of proof. It is that "if the "court is satisfied on the evidence that—(*a*) the case "for the petitioner has been proved . . . the court "shall pronounce a decree of divorce, but if the court "is not satisfied . . . it shall dismiss the petition." Thus the statute under which I am exercising my jurisdiction in this case does not expressly define the standard of proof required. Certainly it does not provide, as in my opinion, if so intended, it should have provided in appropriate language, that the standard of proof applicable to criminal cases should be extended and applied to civil proceedings brought under this particular matrimonial jurisdiction. Such standard was first introduced primarily in the interests of the life and liberty of the subject, and because of the presumption of innocence with which the law invests every person accused of a crime until he is proved to be guilty, and because at that time a prisoner could not be heard in evidence in his own defence: per Pigot C.B. in *Magee v. Mark* (1). Such considerations have no application to divorce proceedings. If a judge is in fact "satisfied" of the existence of adultery, according to the ordinary meaning of that word, even though there may be some slight element of doubt, is it his duty to act contrary to the provision of the statute and to dismiss the petition? I regard the decision of the House of Lords in *Mordaunt v. Moncreiffe* (2) as the only safe ground on which to rest one's opinion. I cannot apply a criminal law standard of proof to adultery and another (or it may be others) to proof of other matrimonial offences. To apply the full criminal standard of proof to all cases of divorce (which alone would be logical if it applied at all) would in my opinion in a large measure nullify jurisdiction and amount, in many cases; to a denial of justice. The rule as to proof beyond all reasonable doubt in criminal cases is, as it has been said, "a rule

(1) (1860) 11 I.C.L.R. 449, 463.

(2) (1874) L.R. 2 H.L. (Sc. & Div.) 374.

" of prudence rather than law." In the words of May C.J. : " where reasonable doubts exist they must " prevail in favour of mercy." The life and liberty of the subject should be safeguarded and protected; and he should not be deprived of either except on clear and cogent evidence. But I cannot equate proof of adultery, which is not an offence known, as such, to the criminal law, with proof of a crime.

Whilst I thus negative the application of the criminal standard of proof as such to divorce cases I freely recognise that a much higher and more strict standard of proof is required than that which applies in the ordinary civil case. Public policy, the rights and privileges of civil status, and " the peculiar duty of " protecting the sanctity of marriage," all call for a higher standard of proof than is required in ordinary civil proceedings which are determined by the preponderance or weight of evidence and the balance of probabilities. The issues in matrimonial cases are of such importance, not only to the parties directly concerned, but to others who might be affected by a change of their civil status, that it would not be safe or proper to act upon the mere weighing down of the scale on the one side or the other according to the opinion formed by a particular judge. The determination of such issues call for special care and caution, and the close scrutiny of all the evidence adduced. The burden is, I think, that which was laid down in Sir William Scott's general rule in *Loveden v. Loveden* (1), " that the circum- " stances must be such as would lead the guarded " discretion of a reasonable and just man to the " conclusion."

Since writing the foregoing part of my judgment a more recent case than any of those which I have cited has come to my attention. It is the case of *Bater v. Bater* (2)—a case of cruelty. I do not think, however, that this case puts the matter much further. Bucknill L.J. emphasises the necessity for a " high standard of " proof " and Denning L.J., without withdrawing anything which he had said in earlier cases, considers the question of what is " a real and substantial doubt "

(1) (1810) 2 Hag. Con. 1, 3. (2) [1950] 2 All E.R. 458

and what is "a reasonable doubt." I do not consider that the high standard which I have referred to above as required in a case of this nature is in any material respect at variance with the views expressed by the Lord Justices in this most recent authority, though perhaps I am more anxious than they appear to be to avoid a phraseology which lawyers have hitherto been in the habit of applying only to criminal cases.

[His Lordship then considered the evidence and in the result granted a decree to the petitioner against the respondent on the ground of the respondent's adultery with the intervener.] (1).

Decree nisi.

Solicitor for the petitioner: *L. R. Hastings.*

Solicitors for the respondent: *Wray & Baxter.*

Solicitors for the intervener: *P. & J. Boyle.*

J. P.

(1) [The judgment in this case has not been revised by the learned Lord Chief Justice.—EDITOR].

IN RE HUNTER, MIDLAND BANK EXECUTOR & TRUSTEE CO. LTD. v. ATTORNEY-GENERAL FOR NORTHERN IRELAND AND OTHERS (1).

Will—Health Services—Contingent gift to voluntary hospital—Testator dying before transfer of hospital—Contingency occurring after transfer—Vesting of gift—Health Services Act (Northern Ireland), 1948 (11 & 12 *Geo.* 6, *c.* 3), *ss.* 25 (1) & (6), 27 (9), 34 (1).

A testator who died in 1943 in his will left his residuary estate in trust for his daughter for life and after her death in trust for her issue, but in case the daughter should have no issue a part of the residue was to be held upon trust to pay or transfer the same to a named hospital. The daughter died without issue on the 14th December, 1948. On the 5th July, 1948, the named hospital was transferred to the Northern Ireland Hospitals Authority under the terms of the Health Services Act (Northern Ireland), 1948, and placed under the control of a management committee. A construction summons was taken out to determine which, if any, of the provisions of the Act relating to the vesting of property were applicable to the gift, and if none whether the gift should be applied cy-pres or pass to the testator's next-of-kin.

Held, that the gift did not constitute a trust in which the property was held immediately before the 5th July, 1948, on trust requiring the trustees to apply part of the capital or income for the purposes of the hospital, and so did not come within the terms of s. 34 of the Act; nor was the gift an endowment within s. 25 of the Act; but it was a gift in a will "coming into operation after" the 5th July, 1948, under s. 27 (9) of the Act, since the gift concerned came into operation only on the occurence of the contingency of the daughter dying without issue, and that accordingly the gift vested in the management committee.

ORIGINATING SUMMONS.

By his will dated the 24th January, 1942, Samuel Coyne Hunter appointed the Midland Bank Executor and Trustee Co. Ltd. as sole executor and trustee and after various specific devises and bequests he devised and bequeathed the residue of his estate to the trustee company upon trust to convert the same into money and to pay the interest of this residuary trust fund to his daughter Mary Coyne Moorhead during her life,

(1) In the Chancery Division before Curran J.; Jan. 16, 17, 18, 31; July 26, 1950.

and after her death upon trust for such of her issue as she should appoint, with provision for such issue in default of appointment, and in case the said daughter should have no issue upon trust to divide the residuary trust fund into ten equal parts and to hold two of these parts "upon trust to pay or transfer same to the "Bangor Cottage Hospital to be invested and the "annual income thereof applied for the use and "benefit of the said hospital."

The testator died on the 6th December, 1943, and on the 14th December, 1948, his daughter Mary Coyne Moorhead died without issue. On the 5th July, 1948, the Bangor Cottage Hospital was transferred to the Northern Ireland Hospitals Authority by virtue of the provisions of the Health Services Act (Northern Ireland), 1948, and was placed with another hospital under the control of the North Down Management Committee.

The trustee company took out this construction summons to determine how it should deal with the residuary trust fund.

McVeigh K.C. and *Moody* for the trustee company.

Lowry for the Attorney-General for Northern Ireland.

Harrison K.C. and *McGonigal* for the North Down Management Committee.

Reid for the next-of-kin of the testator.

Gibson for the trustees of the Bangor Cottage Hospital.

Cur. adv. vult.

CURRAN J. [stated the facts and continued]: The bequest I have to consider is in the nature of a testamentary gift of a capital sum to the Bangor Cottage Hospital with a direction that the annual income thereof shall be applied for the use and benefit of that hospital. In my opinion there is nothing in the terms of the gift to suggest that there was present to the mind of the testator the particular constitution of the Bangor Cottage Hospital at the date of the will. It was not, for example, to "the Governors" or to

" the Committee " or even to " the Trustees " of the hospital. The testator in my view was looking not to the constitution but to the purposes of the hospital. Inasmuch as those purposes are still, in substance, the same, though the hospital is under a different constitution, I am of opinion that there is a valid gift to the hospital known as " The Bangor Hospital."

I have still to consider whether such a gift is affected by the provisions of the Health Services Act (Northern Ireland), 1948, other than those merely affecting the constitution of the hospital and, if so, in what respects.

The many and ingenious arguments of counsel have been mainly directed to establishing on the one hand that such a gift is not provided for under the Act, that accordingly the gift fails and that, as there is no general charitable intention expressed in the will, the subject matter of the gift goes to the next-of-kin ; and on the other hand that the gift is provided for either under s. 34 (1) or s. 25 (1) and (6) or s. 27 (9) of the Act and is payable to the North Down Management Committee or to the trustees appointed under the rules of The Bangor Hospital.

Mr. Harrison, for the North Down Management Committee, relies mainly on s. 34 (1) of the Act and calls in aid the decision and dicta of the Court of Appeal in England in *In re Kellner's Will Trusts, Blundell v. Royal Cancer Hospital and Others* (1). That case, like a number of the cases cited by counsel, arose under the National Health Service Act, 1946, which has no application to Northern Ireland and which in many respects differs from the Health Services Northern Ireland Act of 1948. Mr. Harrison, however, contends that in construing s. 60 of the 1946 Act the Court of Appeal in England was construing a section equivalent to s. 34 of the Northern Ireland Act. I am far from satisfied that this is so. Not only are the provisions of s. 60 (1) and (2) of the 1946 Act different from those of s. 34 (1) and (2) of the 1948 Act, but the sections are found in different contexts. One material difference in context is that there is no section of the English Act equivalent to s. 27 (9) of the Northern

(1) [1950] Ch. 46.

Ireland Act. In the circumstances I do not propose to endeavour to arrive at the interpretation of the Northern Ireland Act by analysing the interpretation of the English Act as expounded in *Kellner's case* (1), and then adapting that interpretation to the provisions of the Northern Ireland Act. I prefer to proceed directly to the consideration of the relevant sections of the Northern Ireland Act.

Section 34 is as follows :—

> " (1) Where property (other than property " transferred to the Authority or to a management " committee under section twenty-three or section " twenty-five of this Act) is held on trust im- " mediately before the appointed day, and the " terms of the trust instrument authorise or " require the trustees, whether immediately or in " the future, to apply any part of the capital or " income of the trust property for the purposes " of any such hospital as is referred to in sub- " section (1) or sub-section (2) of section twenty- " three of this Act, the trust instrument shall be " construed as authorising or, as the case may be, " requiring the trustees to apply the trust " property, to the like extent and at the like " times, for the purpose of making payments, " whether of capital or income, to the management " committee for the hospital or for the group of " hospitals in which it is comprised.
>
> " (2) Any sums paid as aforesaid to a manage- " ment committee shall be applied by them as if " such sums were income from endowments " vested in that committee under section twenty- " five of this Act, and the provisions of that " section shall have effect accordingly."

In my opinion the key to the meaning of this section is to be found in sub-section (2). The sums referred to are to be treated as " income." This indicates to my mind that when referring to the application of capital or income of trust property for the purpose of a hospital the Legislature is referring to trusts that authorise or require the *expenditure* of such capital or income and

(1) [1950] Ch. 46.

not trusts that require the handing over of sums by way of a gift of capital from which merely the income is to be expended on the hospital as in the present case. I find nothing in the section to suggest that the Legislature intended to change the *nature* of the trusts referred to. In my opinion this section has no application to the present case.

Reliance is next placed by Mr. Harrison on the provisions of s. 25 (1) and (6) of the Act. This section deals with endowments of hospitals. By sub-section (1) they are to be transferred to and vested in the Management Committee on an appointed day (not yet declared). In sub-section (6) endowments are defined as property held immediately before the appointed day by the governing body of the hospital or by trustees solely for the purposes of the hospital, being property of the description set out in the sub-section, which description includes shares and money. There is a proviso excepting from such description property coming under s. 34 (1) of the Act. Had the life tenant died and had the trustees of the will handed over to the trustees of the Bangor Cottage Hospital before the 5th day of July, 1948, the hospital's shares of the residuary funds, then in the hands of those hospital trustees, those shares would have become, in my view, endowments of the hospital. I am not satisfied that such shares in the hands of the trustees of the will could be properly described as endowments either in the strict sense or in the wider sense as defined in s. 25 (6). It is the hospital trustees who normally hold property solely for the purposes of the hospital, though it may be that s. 25 (6) has a wider application. Other trustees who are to apply trust property for the purposes of a hospital are covered by s. 34 (1) and such property is expressly excluded from the definition of endowments by the proviso to s. 25 (6). Trustees, as in the present case, who hold property on trust to transfer it to the hospital on a contingency do not, in my opinion, hold such property solely for the purposes of the hospital within the meaning of s. 25 (6).

Finally Mr. Harrison relies on the provisions of s. 27 (9) which are as follows :—

"Every gift to any hospital contained in any "will or other instrument whenever made coming "into operation after the appointed day shall "vest in the management committee having "control of that hospital, and shall be held by "them, subject to any contrary intention therein "expressed, upon the same trusts and subject to "the like conditions and restrictions as they "would have been held had this Act not been "passed, so, however, that neither the capital "nor the income shall be applied towards defraying "any expenditure approved within the meaning "of section forty-nine of this Act, and any reference "in any will or instrument to the governing body "of a hospital shall be construed as a reference to "the management committee having control of "that hospital."

This sub-section was amended by s. 99 and the Third Schedule of the Mental Health Act (N. I.), 1948, but that amendment is not material in the present case.

It will be noted that where a gift comes within this sub-section the terms upon which it is given are preserved. Thus, if the sub-section applies to the gift in the present case, the subject matter of the gift would vest in the management committee on trust to invest and apply the annual income for the use and benefit of the Bangor Hospital. In other words the Legislature appears to be providing in the sub-section for cases such as the present. It is contended, however, that the sub-section only applies to a testamentary gift where the will in which it is contained comes into operation after the appointed day, namely the 5th day of July, 1948, and that in the present case the will came into operation on the death of the testator on the 6th day of December, 1943. It is certainly a fact that from that date the will operated, inter alia, to give a life interest in the residuary estate to the testator's daughter. It was not, however, until her death without issue on the 14th day of December, 1948, five months after the appointed day, that the will operated to enable the trustees to hand over to the hospital its shares of the residuary funds. It is contended that

the will operated from the date of testator's death to the extent of giving a contingent gift to the hospital, and, accordingly, that qua such gift it came into operation before the appointed day. The fact that the sub-section includes gifts in instruments other than wills may assist in the interpretation of the sub-section. It contemplates that such instruments may have been executed before the appointed day but that, though they would normally come into operation from the date of execution, they might, in some manner, come into operation within the meaning of s. 27 (9) after the appointed day. Does a will come into operation from the death of the testator? In a general sense it does, just as a deed may be said to come into operation from the time of its execution or an Act of Parliament from the time it receives the Royal Assent. But in s. 87 (2) of the very Act we are considering we find this provision: "Save as in this Act otherwise "provided, this Act other than this section shall come "into operation on the appointed day, and the "appointed day for the purposes of this Act shall be "such day as the Ministry may appoint, and different "days may be appointed for different purposes and "different provisions of this Act." Accordingly, on receiving the Royal Assent the Act did not come into operation with respect to all its provisions, and even now some provisions, for example s. 25 (1), have not yet come into operation. The coming into operation of an Act with respect to its various provisions is governed by the provisions of the Act itself. It is significant that the Legislature uses the same phrase in s. 27 (9) as it uses and clarifies in s. 87 (2). In adopting the phrase "coming into operation" with respect to wills and other instruments in s. 27 (9) the Legislature is using a phrase which is not peculiar to wills and other instruments, and indeed no authority has been cited by counsel, nor am I aware of any, which suggests that such a phrase is normally used (if at all) with reference to wills or other instruments. I find nothing unnatural in speaking of some provisions of a will as coming into operation at one time, and of other provisions thereof as coming into operation at

another time. Thus one can say that the will in the present case came into operation on testator's death with respect to, inter alia, the life estate given to his daughter and came into operation on her death without issue with respect to the gift to the Bangor Cottage Hospital. In my opinion, reading the will in this way, the phrase " coming into operation " in s. 27 (9) applies to the provisions of the will with reference to the gift to the Bangor Hospital. Accordingly, as testator's daughter died without issue on the 16th December, 1948, that is to say after the appointed day, I hold that the will came into operation with respect to the gift to the Bangor Hospital after the appointed day, and that the gift vests in the North Down Management Committee under s. 27 (9) of the Health Services Act (Northern Ireland), 1948.

Declaration accordingly.

Solicitors for the plaintiff company : *C. & J. Black.*

Solicitor for the Attorney-General for Northern Ireland : *Malcolm B. Davidson.*

Solicitor for the Management Committee : *K. Donaghy.*

Solicitors for the next-of-kin : *Norman Wilson & Co.*

Solicitors for the Hospital Trustees : *White, McMillan & Wheeler.*

J. P.

INDEX

AIDING AND ABETTING .. 98
See CRIMINAL LAW—AIDING AND ABETTING.

BANKER—SOLICITOR CUSTOMER—*Two accounts—Clients' moneys account—Right of banker to set off debit on one account against credit on other account—Solicitors Act (Northern Ireland)*, 1938 (2 *Geo.* 6, *c.* 14), *ss.* 33, 34, 37. A solicitor who had an account with a bank opened a second account for the purpose of banking clients' moneys but he did not state this purpose to the bank at the time the second account was opened. The bank claimed that it was entitled to set off the amount which the first account was in debit against the amount which the second account was in credit. *Held*, (i) that in the absence of any agreement to the contrary a bank is entitled to combine a customer's accounts and set off the debit balance of those in debit against the amount standing to the credit of those in credit, unless it has notice that the sums standing to the credit of the customers are trust funds of which the customer has control in a fiduciary capacity; (ii) that though the nature or number or magnitude of transactions passing through a particular account of a solicitor may afford notice to the bank that such account is an account of clients' moneys, this is a question of fact to be determined in each case, and the mere fact that a solicitor opens a second account does not of itself constitute such notice; (iii) that s. 37 (2) of the Solicitors Act (Northern Ireland), 1938, which provides that a bank at which a solicitor keeps an account for clients' moneys shall not, in respect of any liability of the solicitor to the bank (not being a liability in connection with that account) have any right of set-off against moneys standing to the credit of that account, applies only to accounts which to the knowledge of the bank are clients' moneys accounts. (iv) that when a bank acquires notice that one of the accounts kept by a customer is a trust account it may nevertheless exercise any right of set-off to which it may then be entitled having regard to the state of the accounts at the time of acquiring such notice. If a customer has two accounts with a bank, one in credit and one in debit, the legal position in the ordinary case is not that there are two distinct debts, one owed by the banker and the other owed by the customer. Accounts are merely entries of transactions in books, and where a customer has several accounts with a banker the true position at any time as between banker and customer will only be found by deducting the aggregate of the customer's debit balances from the aggregate of his credit balances, or vice versa. *Clark v. Ulster Bank Ltd.* [CH.D. 132

BUILDING SOCIETY—LAND PURCHASE ANNUITY—*Whether "a prior "mortgage"—Building Societies Act*, 1894 (57 & 58 *Vict.*, *c.* 47), *s.* 13 (1). A prior charge in the form of a land purchase annuity payable to the Ministry of Finance for Northern Ireland is not "a prior mortgage" within the meaning of s. 13 (1) of the Building Societies Act, 1894. *Provincial Building Society v. Brown and the Ministry of Finance for Northern Ireland.* .. .. [Ch.D. 163

CASES—
In re McCleary [1923] 1 I.R. 16 discussed 83
See WILL—CONSTRUCTION—CONDITION.
Churchman v. Churchman [1945] P. 44 not followed .. 181
See DIVORCE.
Ginesi v. Ginesi [1948] P. 179 not followed 181
See DIVORCE.

COSTS—SECURITY FOR .. 150
See PRACTICE.

CRIMINAL LAW—AIDING AND ABETTING—*Probation of offenders—Motor Vehicles and Road Traffic Act (Northern Ireland)*, 1934 (24 & 25

Geo. 5, *c.* 15) *s.* 51—*Summary Jurisdiction and Criminal Justice Act (Northern Ireland)*, 1935 (25 & 26 *Geo.* 5, *c.* 13) *s.* 56. To aid and abet the commission of the offence of using an uninsured motor vehicle contrary to s. 6 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1930, constitutes the offence of using an uninsured motor vehicle contrary to that section for the purposes of s. 51 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, and the Second Schedule thereto, as amended by s. 56 of the Summary Jurisdiction and Criminal Justice Act (Northern Ireland), 1935. Accordingly the benefit of the Probation of Offenders Act, 1907, cannot be given to a person against whom a charge of aiding and abetting the commission of such an offence has been proved. The nature of aiding and abetting and the effect of the statutory provisions relating to summary proceedings against aiders and abettors considered. *Tease v. Quinn* .. .. [K.B.D. 98

——PRACTICE — *Sentence — Prisoner arraigned for murder pleading guilty of manslaughter — Plea accepted— What facts should be considered in assessing sentence—Whether severe sentence may be imposed in case of manslaughter committed under influence of drink.* A prisoner arraigned on indictment charging him with murder pleaded not guilty of murder but guilty of manslaughter, on the ground that at the time of the act he was under the influence of drink to such an extent as to be incapable of forming the intent requisite for murder. This plea was accepted with the approval of the trial judge who, after hearing some evidence and submissions on behalf of the prisoner, imposed a sentence of twelve years' penal servitude. The prisoner appealed against the sentence on the grounds that it was excessive in the circumstances, and based on wrong principles in that the trial judge had taken into consideration matters which were irrelevant in view of the acceptance of the plea, and matters not fully proved in evidence or by the depositions. *Held*, (i) that although the acceptance of the plea ruled out all facts which tended to show any intent negatived by that plea, nevertheless the trial judge was bound to consider all the circumstances of the case, and in so doing was entitled to have regard to the degree of knowledge of the accused at the time of the commission of the offence. (ii) that the trial judge was wrong in taking into account matters which were not proved with a sufficient degree of certainty in the depositions nor in evidence but which were merely possible inferences from the facts before him. (iii) that there is no rule that a severe sentence should not be imposed in a case of manslaughter committed under the influence of drink. (iv) that it was the duty of the Court of Criminal Appeal to consider for itself on the material before it was a proper sentence to be imposed, and having done so the court considered that the sentence imposed by the trial judge was not excessive and should be affirmed. *Rex v. Henry Browne* .. .. [C.C.A 20

——PRACTICE—*Recorded sentence.* A criminal court has an inherent power to record a sentence against a convicted prisoner and to bind him over on recognisance to attend for judgment on notice. *R. v. Wightman* [C.C.A.124

——PROCEDURE—*Trial for felony—Murder — Jury —Separation before summing up—Irregularity—Effect on verdict—Miscarriage of justice—Conviction quashed—Whether* venire de novo *can be ordered—Criminal Justice Act (Northern Ireland)*, 1945 (9 & 10 *Geo.* 6, *c.* 15), *s.* 39. A jury empanelled in a lengthy trial for murder was lodged each evening in the courthouse. On the third day of the trial the jury sought and obtained the permission of the trial judge to go for an evening drive in a private omnibus for the purpose of fresh air and exercise. The permission was given on condition that the jurors should be in charge of four constables sworn as jury keepers, two of whom were to precede and the other two to follow the jurors during their exercise. In the course of the drive the omnibus stopped at a seaside town where the jurors split into three groups, one of which went into a private room in an hotel for drinks, and each of the other two went for a walk in the course of which they entered a cafe for refreshments. Each group was accompanied by at least one jury keeper, and the evidence of the jury keepers was that none of the jurors conversed with any member of the public except for the purpose of ordering refreshment. On

the following evening, without any further permission from the trial judge, nine of the jurors accompanied by three jury keepers went for a drive in a private omnibus to a neighbouring town. The remaining jurors stayed in the courthouse with the other jury keeper. The nine jurors, on arriving at their destination, split into three groups each accompanied by a jury keeper. One group went into a private room in an hotel for drinks. A second group of three jurors went into a shop where one juror spoke to the shopkeeper who was an acquaintance while the other jurors engaged in general conversation with customers in the shop. The jury keeper in charge of this group deposed that no reference to the trial was made by any person. After leaving the shop this second group went for a walk and then returned to the lounge bar of an hotel where members of the public were present, but the jurors spoke to no one except when ordering drinks. The third group went for a walk and then entered a cafe where they had coffee: though members of the public were present in the cafe the jurors spoke to no one except when ordering coffee. On the return journey on this second evening the driver of the omnibus, at the request of the foreman, made a detour in order to pass a road junction near the scene of the crime which had been referred to in the course of the trial. None of these facts was known to the trial judge or counsel until after conviction and sentence. *Held*, (i) that the foregoing facts showed such irregularities in the established procedure relating to the separation of juries as to vitiate the verdict. (ii) that a substantial deviation from the established rules of procedure is itself a miscarriage of justice, and it was irrelevant to consider whether the accused had in fact been prejudiced by these irregularities. (iii) that as the trial was not such a mistrial as to be a nullity from the outset there was no power in the Court of Criminal Appeal to order a *venire de novo*, and that accordingly the conviction must be quashed. The common law rules relating to the separation of juries in cases of felony in the period before the summing up, though less strict than those which apply after summing up, require the segregation of the jurors from the general public, with whom they may not have any communication except in case of necessity or emergency. A judge may, however, in his discretion allow a jury to have an outing for fresh air and exercise, but in such a case they must be kept together as a body. *Rex v. Robert Taylor* .. .. [C.C.A. 57

DIVORCE—ADULTERY—*Onus of proof—Matrimonial Causes Act* (*Northern Ireland*), 1939 (2 & 3 *Geo.* 6, *c.* 13), *s.* 5 (2). The standard of proof required of a petitioner who alleges adultery is more stringent than that required of a plaintiff in other civil actions which may be determined on a mere balance of probability, but less stringent than the standard of proof "beyond reasonable doubt" which is required in criminal cases. The standard required may be stated as follows, "that the circumstances "must be such as would lead the "guarded discretion of a reasonable "and just man to the conclusion." *Semble* that the same standard is applicable in cases of matrimonial offences other than adultery. *Ginesi v. Ginesi* [1948], P. 179, and *Churchman v. Churchman* [1945], P. 44, not followed. *Lyons v. Lyons* (*Carne intervening*) [K.B.D. (Matrimonial) 181

HIGHWAY—STREET TRADING—*Street Trading* (*Regulation*) *Act* (*Northern Ireland*), 1929 (20 *Geo.* 5, *c.* 9) *ss.* 1, 9 (1)—*Whether private street not maintained by local authority a "street" within the meaning of Act.* A private street not maintained by the local authority but over which there is a public right of way is a street within the meaning of sections 1 and 9 of the Street Trading (Regulation) Act (Northern Ireland), 1929. *Bangor Borough Council v. Lennon* [K.B.D. 172

HIRE PURCHASE AGREEMENT—*Contract for sale in breach of conditions—Subsequent exercise of option to purchase—Whether title thus obtained passes to purchaser under prior contract.* A contract for the hire purchase of a car provided that it should not be construed as a purchase or agreement to purchase and that the hirer should have no right to assign the contract without the written consent of the owners, but that if the hirer paid all instalments he should have the option to purchase the car for a nominal sum. Before all the

instalments were paid the hirer purported to sell the car to the plaintiffs. Subsequently the hirer regained possession of the car and contracted to sell it to X, this last contract being entered into with the knowledge and oral consent of the owners. The hirer paid off the balance of the instalments with money found by X and then exercised his option to purchase. X let the car to the defendant under a hire purchase contract. In an action for damages for conversion. *Held*, (i) that the purported sale to the plaintiffs was a nullity since the hirer had at that time no title or interest which he could assign, and that this defect was not cured when the hirer later paid off the balance of instalments and exercised his option to purchase, and accordingly the plaintiffs had no title to the car. (ii) that the contract by the hirer to sell the car to X, being subject to the hirer obtaining a complete title from the owners, was a valid contract to sell after acquired property, and when the balance of instalments was paid and the option to purchase exercised a good title was acquired by X. (iii) that even if X, through whom the defendant claimed, had no title the plaintiffs' action for conversion must fail since the defendant was in possession and the plaintiffs had failed to prove any right to possession. *H. W. West, Ltd. v. McBlain* [K.B.D. 144

HOSPITAL 187
See WILL—HEALTH SERVICES.

HOUSING—*Housing Act* (*Northern Ireland*), 1948 (12 & 13 *Geo.* 6, *c.* 9), *s.* 4—*Construction—Whether retrospective—Nature of rights conferred by the Rent Acts—Rent and Mortgage Interest* (*Restrictions*) *Act* (*Northern Ireland*), 1940 (4 *Geo.* 6, *c.* 7.) The effect of section 4 of the Housing Act (Northern Ireland), 1948, is thereafter to exempt from the provisions of the Rent and Mortgage Interest (Restrictions) Act (Northern Ireland), 1940, all houses of the Irish Sailors and Soldiers Land Trust whether provided before or after the passing of the Act of 1948. Per Porter L. J.: Such a construction is not objectionable on the ground that it affects vested rights restrospectively, because the rights of tenants under the Rent Acts remain inchoate until the landlord purports to increase the rent or serves a notice to quit. Observations on the use of the long title of a statute as an aid to its interpretation. *Galloway v. Irish Sailors and Soldiers Land Trust* .. .. [C.A. 32

JURY—SEPARATION 57
See CRIMINAL LAW—PROCEDURE

LAND PURCHASE 163
See BUILDING SOCIETY.

LOCAL GOVERNMENT—*Power of local authority to require owner or occupier to supply dustbin—Notice to owner—Complaint at petty sessions—Jurisdiction of petty sessions to consider equities as between owner and occupier—Belfast Corporation Act* (*Northern Ireland*), 1930 (20 & 21 *Geo.* 5, *c.* ii), *s.* 44. On the hearing at petty sessions of a complaint by the Corporation that the defendant as owner of a dwelling-house failed to comply with a notice under s. 44 of the Belfast Corporation Act (Northern Ireland), 1930, requiring him to provide and maintain a dustbin for the dwellinghouse, the resident magistrate has no jurisdiction to consider whether it would have been more equitable for the Corporation to have imposed the obligation on the occupier instead of on the owner, but must impose a penalty on proof that the requirements of the notice have not been complied with. *Belfast Corporation v. McCormick* .. .. .. [K.B.D. 1

MALICIOUS INJURY—*Whether dismantling a machine is "damage"—Parts of machine removed—Measure of compensation—Grand Jury* (*Ireland*) *Act*, 1836 (6 & 7 *Wm.* 4, *c.* 116), *s.* 135—*Malicious Damage Act*, 1861 (24 & 25 *Vict.*, *c.* 97), *s.* 15—*Local Government* (*Ireland*) *Act*, 1898 (61 & 62 *Vict.*, *c.* 37), *s.* 5 (1). The applicant claimed compensation for damage to two tractor ploughs. The ploughs had been left in a field by the applicant's son, and on his return he found that they had been dismantled. Some parts had been removed, but the remaining parts were undamaged. There was no evidence as to what had become of the missing parts. *Held*, (1) that the dismantling of the ploughs constituted damage to them within the meaning of the Malicious Damage Act, 1861, and that the applicant was therefore entitled to recover compensation; (ii) that compensation was

limited to the cost of reassembling the ploughs, there being no evidence that the missing parts had been damaged or destroyed. Decisions concerning larceny subsequent to malicious damage considered. *Getty v. Antrim County Council* [Judge of Assize 114

MARRIAGE SETTLEMENT—CONSTRUCTION—*Covenant to settle property acquired during coverture "whether in possession, reversion or otherwise"—Property acquired subject to contingency—Vesting occurring after termination of coverture—Whether property caught by settlement.* A marriage settlement contained a covenant by the wife to bring into the settlement property acquired by will or gift from her father during coverture "whether "in possession, reversion or otherwise." *Held,* that these words included property to which the wife became contingently entitled under her father's will but which did not vest until after coverture was determined. *In re Corry's Will Trusts, Corry v. Corry* .. .. [Ch.D.159

MOTOR CAR—*Licensing—Lorry operated under General Trade Licence—Whether Goods Vehicle Licence required for carrying goods on highway—Road Vehicles (Registration and Licensing) (Northern Ireland) Regulations, 1947 (S.R. & O., 1947, No. 167), reg. 29, art E.—Motor Vehicles and Road Traffic Act (Northern Ireland), 1934 (24 & 25 Geo. 5, c. 15), s. 24.* Article E of regulation 29 of the Road Vehicles (Registration and Licensing) (Northern Ireland) Regulations, 1947, which provides that it shall not be necessary for a vehicle properly carrying, using and displaying General Trade Licence plates "to carry any "other identification mark or licence in respect of the vehicle" does not dispense with the requirements of s. 24 of the Motor Vehicles and Road Traffic Act (Northern Ireland), 1934, by which no person may use a goods vehicle on the public highway for the carriage of goods unless there be in force with respect to such vehicle a Goods Vehicle Licence granted under s. 25 of that Act. Accordingly when a garage proprietor used his motor lorry which carried General Trade Licence plates for carrying a broken-down car and towing a truck it was *held* that such use of the lorry required a Goods Vehicle Licence. *Creery v. Judge* .. .. [K.B.D. 13

ONUS OF PROOF 181
See DIVORCE.

PRACTICE—PROBATE—*Security for costs—Caveator—Conflict between Irish and English decisions—R. S. C. Or.* 29, *r.* 1. A defendant who voluntarily enters a caveat without previous citation becomes a party who according to the Irish practice may, and if the facts otherwise warrant it should, be ordered to give security for costs. *Dobler v. Walsh* [K.B.D. (Probate) 150

PROBATE 150
See PRACTICE.

PROBATION 98
See CRIMINAL LAW—AIDING AND ABETTING.

ROAD TRAFFIC — AIDING AND ABETTING OFFENCES .. 98
See CRIMINAL LAW—AIDING AND ABETTING.
——LICENSING 13
See MOTOR CAR.

RENT RESTRICTIONS .. 32
See HOUSING.

SENTENCE 20
See CRIMINAL LAW—PRACTICE.

SET-OFF 132
See BANKER.

SETTLEMENT 159
See MARRIAGE SETTLEMENT.

SOLICITOR—BANK ACCOUNTS 132
See BANKER.

STATUTE—STATUTORY CONSTRUCTION 32
See HOUSING.

STATUTES—
——6 & 7 Wm. 4, c. 116, s. 135 114
See MALICIOUS INJURY.
——24 & 25 Vict., c. 97, s. 15 114
See MALICIOUS INJURY.
——57 & 58 Vict., c. 47, s. 13 (1) 163
See BUILDING SOCIETY.
——61 & 62 Vict., c. 37, s. 5 (1) 114
See MALICIOUS INJURY.
——20 Geo. 5 (N.I.), c. 9, ss. 1, 9 172
See HIGHWAY
——20 & 21 Geo. 5 (N.I.), c. ii, s. 44 1
See LOCAL GOVERNMENT.

STATUTES—(*cont.*)
——24 & 25 Geo. 5 (N.I.), c. 15, s. 24 13
See MOTOR CAR.
——24 & 25 Geo. 5 (N.I.), c. 15, s. 51 98
See CRIMINAL LAW—AIDING AND ABETTING.
——25 & 26 Geo. 5 (N.I.), c. 13, s. 56 98
See CRIMINAL LAW—AIDING AND ABETTING.
——2 Geo. 6 (N.I.), c. 14, ss. 33, 34, 37 132
See BANKER.
——2 & 3 Geo. 6 (N.I.), c. 13, s. 5 (2) 181
See DIVORCE.
——4 Geo. 6 (N.I.), c. 7 .. 32
See HOUSING.
——9 & 10 Geo. 6 (N.I.), c. 15, s. 39 57
See CRIMINAL LAW—PROCEDURE
——11 & 12 Geo. 6 (N.I.), c. 3, ss. 25, 27, 34 187
See WILL—HEALTH SERVICES.
——12 & 13 Geo. 6 (N.I.), c. 9, s. 4 32
See HOUSING.

STATUTORY RULES AND ORDERS—
——Road Vehicles (Registration and Licensing) (Northern Ireland) Regulations, 1947. (S.R. & O., No. 167 of 1947), reg. 29, art. E 13
See MOTOR CAR.
—— R.S.C. Order 29, r. 1 .. 150
See PRACTICE.

STREET—STREET TRADING .. 172
See HIGHWAY.

WILL — CONSTRUCTION — *Oral statements by testator, whether admissible.* Where there are rival claimants for a benefit under a will and it is shown that one claimant alone completely and accurately answers to the testator's description, there is a very strong presumption that he is entitled to benefit, though this presumption may be rebutted. Evidence of the testator's circumstances and of his relationship to the two claimants is admissible to rebut the presumption. Evidence of statements made by the testator about the contents of his will is not admissible to rebut the presumption, for evidence of statements showing testamentary intention can only be received where there is equivocation. A testator left a legacy to "John Patterson of the Gates, Ballydyan." The legacy was claimed by John Patterson of the Hill, Ballydyan, and John Patterson of Glenelm, Ballydyan. It was found that the family of Patterson of Glenelm was formerly known as "Patterson of the Gates," and that this mode of referring to the family was still known in the neighbourhood. *Held*, that there was a presumption that John Patterson of Glenelm was entitled to the legacy, and that evidence of statements made by the testator that he did not intend to benefit John Patterson of Glenelm were not admissible as evidence of testamentary intention. Mistakes in the wording of a will can only be corrected, if at all, by a court of probate and not by a court of construction, except where the correction can be made as a matter of construction of the will itself and without extrinsic evidence of the testator's intention. *In re Carlisle, Belfast Bank Executor and Trustee Co. v. Patterson and others* .. .. [Ch.D. 105

——CONSTRUCTION—CONDITION—*Whether condition precedent or subsequent.* A testatrix devised her farm to J. C. "provided he comes to reside "on the lands within twelve months "of my death." Five months after the testatrix's death J. C. returned to the farm and spent one night there after which he left and never came back. *Held*, that the devise showed an intention to impose a condition precedent and not a condition subsequent, and that the condition was valid but unperformed. *In re McCleary* [1923] 1 I.R. 16 considered and criticised. In determining whether a testator intended to impose a condition precedent or a condition subsequent, the facts that the condition requires only a single act to be performed, that it is capable of being performed immediately, that a time limit for its performance is allowed, and that it is drafted in the present tense, are all matters which tend to show that it should be construed as a condition precedent. Decision of Curran J. affirmed. *In re Doherty, Quinn v. Clarke and Another* [C.A. 83

HEALTH SERVICES — *Contingent gift to voluntary hospital—Testator dying before transfer of hospital—Contingency occurring after transfer—Vest-*

ing of gift—Health Services Act (Northern Ireland), 1948 (11 & 12 *Geo.* 6, c. 3), *ss.* 25 (1) & (6), 27 (9), 34 (1). A testator who died in 1943 in his will left his residuary estate in trust for his daughter for life and after her death in trust for her issue, but in case the daughter should have no issue a part of the residue was to be held upon trust to pay or transfer the same to a named hospital. The daughter died without issue on the 14th December, 1948. On the 5th July, 1948, the named hospital was transferred to the Northern Ireland Hospitals Authority under the terms of the Health Services Act (Northern Ireland), 1948, and placed under the control of a management committee. A construction summons was taken out to determine which, if any, of the provisions of the Act relating to the vesting of property were applicable to the gift, and if none whether the gift should be applied cy pres or pass to the testator's next-of-kin. *Held*, that the gift did not constitute a trust in which the property was held immediately before the 5th July, 1948, on trust requiring the trustees to apply part of the capital or income for the purposes of the hospital, and so did not come within the terms of s. 34 of the Act: nor was the gift an endowment within s. 25 of the Act; but it was a gift in a will "coming "into operation after" the 5th July, 1948, under s. 27 (9) of the Act, since the gift concerned came into operation only on the occurrence of the contingency of the daughter dying without issue, and that accordingly the gift vested in the management committee. *In re Hunter, Midland Bank Executor and Trustee Co., Ltd. v. Att.-Gen. for Northern Ireland and others* [Ch.D. 187

WORDS—
——" damage " 114
See MALICIOUS INJURY.
——" mortgage " 163
See BUILDING SOCIETY.
——" possession, reversion or otherwise " 159
See MARRIAGE SETTLEMENT.
——" reside " 83
See WILL—CONSTRUCTION—CONDITION.
——" street " 172
See HIGHWAY.

THE
ORTHERN IRELAND LAW REPORTS

Under the Superintendence and Control of the

CORPORATED COUNCIL OF LAW REPORTING FOR NORTHERN IRELAN

In one Annual Volume consisting of four Quarterly Parts Published in January, April (with the Northern Ireland Statutes for the preceding Calendar Year) July and November.

1951.

PART I.—JANUARY.

(p. 1 to 53).

EDITED BY FRANCIS NEWARK, ESQ.,
BARRISTER-AT-LAW.

TABLE OF CASES:

	PAGE
WALSHE *v.* TAGGART .. .. .. C.A.	1
REX (McNAIR) v. JUSTICES OF THE COUNTY OF THE CITY OF BELFAST .. .. C.A.	22

AGENTS FOR CANADA AND THE U.S.A.: THE CARSWELL CO. LTD., TORONTO.

PUBLISHED BY THE COUNCIL AT THE LAW LIBRARY, ROYAL COURTS OF JUSTICE (ULSTER), BELFAST,

AND

INTED BY R. CARSWELL & SON, LTD., QUEEN STREET, BELFAST.

UNIVERSITY OF LONDON
27 APR 1979

RECENT PUBLICATIONS

LEWIN: THE LAW OF TRUSTS

Fifteenth Edition by R. Cozens-Hardy Horne, *Barrister-at-Law.* With Supplement £5 6*s.* 6*d.* post paid.

In this new edition the Editor has revised the text to accord with modern forms of trust which demand greater flexibility and increase the importance of the trustee, whose discretionary powers are now usually exceedingly wide. A new chapter has been added dealing with the liability of trustees for estate duty.

LINDLEY: THE LAW OF PARTNERSHIP

Eleventh Edition by H. E. Salt, K.C. and H. E. Francis, LL.B. £6 7*s.* 9*d.* post paid.

Since the last edition certain decisions and Acts of Parliament have necessitated some considerable re-writing of the text and—as the Right Hon. Lorth Uthwatt says in his Foreword—" no pains have been spared to render the book thoroughly up to date and serviceable."

BRIGHOUSE: SHORT FORMS OF WILLS

Sixth Edition by E. F. George and J. H. George, *Solicitors.* 16*s.* post paid.

In this new edition the Editors have thoroughly revised all the forms, many of which were rendered impracticable by the incidence of taxation. Those dealing with trust limitations have been simplified to meet present day needs of testators. A new section on traders' wills has been added.

GALE: THE LAW OF EASEMENTS

Twelfth Edition by D. H. McMullen, *Barrister-at-Law.* £3 11*s.* 3*d.* post paid.

In this new edition the Editor has re-written many parts, notably that on acquisition of easements by implied reservation. New decisions have necessitated many alterations, and for the first time there is a discussion of equitable easements.

BENJAMIN: THE LAW OF SALE OF PERSONAL PROPERTY

Eighth Edition by the Hon. Sir D. L. Finnemore and A. E. James, *Barrister-at-Law.* £5 11*s.* 6*d.* post paid.

" In the whole range of legal literature we know of no book so indispensable to the lawyer, and none so readily records an answer to the ever-recurring questions, arising from complex facts and slovenly drawn contracts and statutes, presented to the lawyer."—*Canadian Bar Review.*

SWEET & MAXWELL, LIMITED.

2 & 3 CHANCERY LANE, LONDON, W.C. 2.